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TRANSCRIPT OF RECORD.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1921.

No. 725.

THE UNITED STATES OF AMERICA EX RELATIONE WILLIAM F. CREARY, PLAINTIFF IN ERROR,

vs.

JOHN W. WEEKS, SECRETARY OF WAR.

IN ERROR TO THE COURT OF APPEALS OF THE DISTRICT OF COLUMBIA.

FILED JANUARY 30, 1922.

(28,680)

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1 Supreme Court of the District of Columbia.

At Law.

No. 64936.

THE UNITED STATES OF AMERICA ex Relatione WILLIAM F. CREARY, Petitioner,

vs.

NEWTON D. BAKER, Secretary of War, Respondent.

UNITED STATES OF AMERICA,
District of Columbia, ss.

Be it remembered, that in the Supreme Court of the District of Columbia, at the City of Washington, in said District, at the times hereinafter mentioned, the following papers were filed and proceedings had, in the above-entitled cause, to wit:

Petition for Writ of Mandamus.

Filed January 3, 1921.

In the Supreme Court of the District of Columbia.

At Law.

No. 64936.

THE UNITED STATES OF AMERICA ex Relatione WILLIAM F. CREARY, Petitioner,

vs.

NEWTON D. BAKER, Secretary of War, Respondent.

To the said Supreme Court of the District of Columbia:

Your petitioner and relator, William F. Creary, respectfully represents:

1. That he is a citizen of the United States and a resident of the District of Columbia, and files this petition in his own right against the defendant, Newton D. Baker, who is Secretary of War, and as such an officer of the Government of the United States and temporarily resident in the District of Columbia.

2. Petitioner represents that he was born in the District of Columbia the 27th day of April, 1870; that he enlisted in the Regular Army of the United States on the 19th day of January, 1893, and served as private, corporal, and sergeant, Company C, 3rd Infantry,

from the date of his enlistment to the 23rd day of March, 1896; that after and as the result of a competitive examination he was duly nominated, confirmed by the Senate, appointed, and commissioned, from the ranks of the Army, second lieutenant, Infantry, the 5th day of March, 1896, and accepted said commission the 24th
2 day of March, 1896; thereafter and in due course of lineal promotion in accordance with the law governing promotion in the Army as it existed up to June 4, 1920, he was, after due examination and a finding of moral, professional, and physical qualification, nominated, confirmed, appointed, and commissioned first lieutenant, 12th Infantry, the 12th day of August, 1898; that after a like examination and finding of moral, professional, and physical fitness, he was nominated, confirmed, appointed, and commissioned captain, 30th Infantry, the 9th day of April, 1901; that after a like examination and finding of moral, professional, and physical qualification, he was nominated, confirmed, appointed, and commissioned major the 1st day of July, 1916; that he was nominated, confirmed, appointed, and commissioned lieutenant colonel (in the temporarily increased regular establishment) the 5th day of August, 1917, and that he was likewise commissioned colonel in the temporarily increased regular establishment on the same day, and that by a system of selection and not by promotion he was appointed and commissioned colonel in the National Army on the same day; that thereafter, after the armistice and after due examination and finding of moral, professional, and physical qualification, he was nominated, confirmed, appointed, and commissioned lieutenant colonel, 5th Infantry in the Regular Army, the 27th day of December, 1919, and that he was duly appointed and commissioned by promotion colonel in the Regular Army July 20, 1920, to rank from July 1, 1920, and that he served in such status until the 23rd day of November, 1920, when he received the following order:

War Department,
Washington, November 17, 1920.

Special Orders No. 271-O. PEM 423. Confidential.

Extract.

69. Colonel William F. Creary, Infantry, having been finally classified in Class B, for causes due to his neglect, misconduct, and avoidable habits, his discharge from the Army, by direction of the President, under the provisions of section 24*b*, of the act of Congress approved June 4, 1920, is announced.

By order of the Secretary of War:

PEYTON C. MARCH,
Major General, Chief of Staff.

Official:

P. C. HARRIS,
The Adjutant General.

For official use only, not to be made public.

3 since which time he has been deprived of the office of colonel in the Regular Army of the United States and the pay, allowances, and emoluments of said office. Petitioner respectfully represents that as an enlisted man and an officer in the United States Army for a period of service of twenty-eight years including arduous service in active campaign in all the wars in which this country has been engaged during that time, he has always rendered efficient service and has never been guilty of any neglect of duty, misconduct, or disqualifying habits.

3. Petitioner avers that in the month of June, 1920, he was informed by the War Department that a classification board convened by virtue of the authority of section 24*b* of the act of Congress of June 4, 1920, commonly called the Army reorganization act, had provisionally arranged him in class B as unfit to be retained in the service. Upon such notification petitioner, by virtue of the authority of said section of said act, requested a court of inquiry and accordingly a court of inquiry was convened by the President at the headquarters of the Sixth Corps Area, at Chicago, Illinois, September 21, 1920, to consider the sole question whether or not petitioner should be continued in class B, petitioner appearing before said court of inquiry without counsel. The court of inquiry concluded the inquiry on the day it was convened, after a brief hearing of two and one-half hours, and on the 10th day of October, 1920, a copy of the record of the proceedings was furnished petitioner which showed that the court of inquiry was of the opinion that petitioner should be continued in class B.

4. Petitioner avers that in the court of inquiry, he was not furnished with a full copy of the official records upon which the proposed classification was based, as the statute mandatorily requires. The record of the proceedings of the original classification board shows that that board reported that it had examined "into the record of Colonel William F. Creary, Inf., and upon consideration of his record as a whole from the date of his first commission in the Army of the Unted States to the present date, finds that he should not be retained in the service." Full copy of the petitioner's record as a whole from the date of his first commission in the Army of the United States to the present date (that is the date of the proceedings of the provisional classification board) was not furnished petitioner, but that upon the other hand petitioner was furnished copies of brief extracts from his record containing only all the unfavorable portions of his record and omitting all favorable portions. He avers, therefore, that the court of inquiry proceeded in flagrant violation of the plain mandate of the statute enacted for the benefit of the officer undergoing inquiry in order that he might be fully informed of the basis of the imputation against him and be prepared to

4 meet it. Petitioner is advised and believes, and so avers, that such violation of the mandate of the statute rendered the proceeding of the court of inquiry and all subsequent proceedings based thereon null and void. Petitioner is further informed and believes, and so avers, that the respondent has never caused the

record of the proceedings of said court of inquiry to be transmitted for his review to the Judge Advocate General of the Army and that consequently the said record of said court of inquiry has never been received and reviewed by the Judge Advocate General of the Army, as the statute requires, by reason whereof neither the final classification board, nor the President, nor the board of officers convened to determine the cause of classification, has been advised of the illegal character of the proceedings of said court of injury; and petitioner is further informed and believes, and so avers, that the respondent has never transmitted, or caused to be transmitted, to the President of the United States said record of said court of inquiry for his consideration, review, and action, and that consequently the President has never considered, reviewed, and acted upon said record of proceedings as the law requires.

5. Petitioner avers that after receiving the copy of the proceedings of the court of inquiry, he heard nothing whatever concerning his case until he received the order of discharge hereinbefore set out. He had no notice of the convening of a final classification board, nor of any proceeding, action, or finding by such board; he had no notice of the submission to the President of the finding of such a board, no opportunity to petition the President for a revision of the action of said board, and no notice of any proceeding or action taken by the President thereon, nor of the convening of a board of officers to determine whether the classification thus finally made by the final classification board was due to petitioner's neglect, misconduct, or avoidable habits, nor of any proceeding, action, or finding by such a board of officers; nor had he any notice of the submission to the President of the finding of such a board, or of any proceeding or action taken thereon, nor opportunity to petition the President for a revision of the action of said board of officers.

6. Petitioner avers that he has no personal knowledge that a final classification board and a board of officers, as provided by statute, were ever convened in, or ever gave any consideration to, his case, and he further avers that through his atorneys, by letter dated December 8, 1920, copy of which is annexed hereto and made a part hereof, he requested the War Department to furnish him with a copy of the proceedings had in his case before the final classification board and before the board of officers that determined that his classification was due to his neglect, misconduct, and avoidable habits, and that to such request the War Department has made no reply and with it the said department has not complied. In view of the said communication hereinbefore set out purporting to discharge petitioner from his office in the Regular Army, petitioner believes, and so avers, that by order of the respondent a final classification board was convened and did consider his case, and that likewise a board of officers was convened and did consider the cause of petitioner's classification, and that said final classification board, acting pursuant to the orders of said respondent, held and decided that petitioner should be eliminated from active service in the Army, and that said board of officers, likewise so acting, held

and determined that petitioner should be absolutely discharged from his office in the Army, and that accordingly and as the result of such action the respondent issued the order hereinbefore set out purporting to discharge petitioner from the Army of the United States.

7. Petitioner avers that the proceedings of the final classification board and the proceedings of the said board of officers acting under and pursuant to the orders of said respondent were private, secret, precipitate, and unlawful and without notice to the petitioner and without affording him an opportunity to be heard, and that by reason whereof said proceedings and all subsequent acts and proceedings based thereon are null and void.

8. Petitioner is informed and believes, and he so avers, that one or more of the members of the provisional classification board were disqualified from sitting on said board and from a fair performance of their duty, by reason of the fact that they had made unfavorable reports which were considered by the provisional classification board as a part of the basis of its adverse classification; and petitioner is further informed and believes, and so avers, that one or more members of the final classification board were likewise disqualified from sitting on said board and from a fair performance of their duty by reason of the fact that they had also made unfavorable reports upon petitioner considered by them in determining the final classification of petitioner; and petitioner is further informed and believes, and so avers, that one or more members of the board of officers convened to determine the cause of the classification were disqualified from sitting on said board and from a fair performance of their duties by reason of the fact that they had previously sat as members of a board, administratively convened, that passed adversely upon the efficiency of petitioner. By reason whereof the proceedings of the said provisional classification board, of said final classification board, and of the said board of officers are null and void, and all subsequent proceedings based upon them of no effect.

9. Petitioner is informed and believes, and so avers, that respondent has never transmitted, or caused to be transmitted, to the
6 President for his consideration, review, and action, as the law requires, the record of the proceedings of the said court of inquiry, the record of the proceedings of said final classification board, and the record of the proceedings of said board of officers convened to determine the cause of classification, and that consequently the President has never considered, reviewed, and acted upon any of said proceedings.

10. Petitioner is advised and believes, and so avers, that by reason of the unlawful acts as hereinbefore stated, petitioner has been unlawfully discharged by respondent from the Army of the United States and by him deprived of his office of colonel therein and of the pay, allowances, and emoluments incident to said office, in violation of the statute and without due process of law.

Wherefore, inasmuch as the said respondent has, in his attempt to discharge petitioner from the Army as aforesaid, acted beyond his power and jurisdiction in the premises and has done petitioner irreparable harm and injury, and inasmuch as the law provides no other remedy in the premises whereby your petitioner can have relief, your petitioner prays:

(1) That a writ of mandamus may be issued and directed to the said Newton D. Baker, Secretary of War, commanding him to vacate and set aside the said order of discharge, dated the 17th day of November, 1920, purporting to discharge your petitioner from the Army, and to restore your petitioner to his office of colonel in the Army of the United States.

(2) For such other and further relief as the court may deem proper and the nature of the case may require.

And your petition will ever pray.

WILLIAM F. CREARY,
Petitioner.

RUSSELL & BAILEY,
Counsel for Petitioner.

DISTRICT OF COLUMBIA, ss:

I do solemnly swear that I have read the foregoing petition by me subscribed, and know the contents thereof; and that the statements of fact therein made as upon personal knowledge are true, and those made as upon information and belief I believe to be true.

WILLIAM F. CREARY.

Subscribed and sworn to before me this 30 day of December, 1920.

[SEAL.] T. C. MEIDINGER.
Notary Public, D. C.

7 *Rule to Show Cause.*

Filed January 3, 1921.

* * * * * * *

Upon consideration of the petition filed herein by the United States of America ex relatione William F. Creary, it is by the court this 3d day of January, 1921, ordered that the said respondent, Newton D. Baker, Secretary of War, be, and he is hereby, commanded and ordered to show cause on the 21st day of January, 1921, why the writ of mandamus should not issue out of this court commanding him to vacate and set aside the said order, dated the 17th day of November, 1920, purporting to discharge the relator, William F. Creary, from the Army of the United States and to restore said relator, William F. Creary, to his office of colonel in the Army of the United States, as prayed in the relator's petition herein: Provided, That a

copy of this order be served upon the said respondent on or before the 5th day of January, 1921.

By the Court:

WALTER I. McCOY,
Chief Justice.

Answer of Defendant, Newton D. Baker, Secretary of War, to Petition for Mandamus and to Rule to Show Cause.

Filed January 25, 1921.

* * * * * * *

Newton D. Baker, Secretary of War, now and at all times saving and reserving unto himself all exceptions to the imperfections, uncertainties, and defects in the petition for writ of mandamus filed herein, and reserving unto himself the benefit of the lack of jurisdiction of the court, appearing on the face of said petition, to grant the relief prayed for, and the lack of jurisdiction of the court to direct him, as Secretary of War, to perform the act in question, and relying on the same, as if demurrer had been specifically interposed, for answer to said petition or so much thereof as is material, and to said rule to show cause, says:

1. Defendant admits the allegations of the first paragraph of the petition.

2. Defendant admits the allegations of the second paragraph of the petition except the allegations of the last two lines thereof, which he denies.

3. Defendant admits the allegations of the third paragraph of the petition except the allegation that the court of inquiry therein referred to was convened to consider the sole question whether
8 or not plaintiff should be continued in class B, as to which defendant avers that said court of inquiry considered all questions required by the statute to be considered by said court, including the question whether or not plaintiff should be continued in class B.

4. Defendant denies the allegations of the first sentence of the fourth paragraph of the petition and with respect to that and the second sentence thereof, defendant avers that plaintiff was, in the court of inquiry therein referred to, furnished with a full copy of all unfavorable reports, notations, or papers considered by either the original or final classification board in his case; that the same were the only records upon which his classification in class B was based or proposed to be based and that such course of procedure is, as defendant believes and therefore avers, in all respects as required by statute; and defendant further avers that in said court of inquiry plaintiff was given full opportunity to examine the entire record of his service as an officer of the Army from the date of his first commission therein to the date of the session of said court,

Defendant admits that the record of the proceedings of the court of inquiry in plaintiff's case was not transmitted to the Judge Advocate General of the Army or reviewed by him. With respect to the closing allegations of said paragraph appearing at the top of page five of the petition, defendant alleges that the record of the court of inquiry was considered together with the record of the final classification board and acted upon in the manner more particularly set forth in paragraph 9 hereof. With respect to the other allegations of said paragraph, defendant is advised by counsel that the same are matters of law or argument which are not well pleaded and that he is not required to answer the same; and he therefore refrains therefrom.

5. Defendant admits the allegations of the fifth paragraph of the petition except the allegation that plaintiff had no opportunity to petition the President for a revision of the action of the final classification board or of the board to determine the cause of his classification, as to which he avers that he has taken no action preventing or hindering plaintiff from petitioning the President for an order in revision of the proceedings of either of said boards. Defendant further avers that plaintiff never requested notice of any of the actions or proceedings mentioned in said paragraph or opportunity to petition the President as therein suggested.

6. In answer to the allegations of the sixth paragraph of the petition, defendant admits that no notice was given plaintiff of the meeting of the final classification board or of the board of officers to determine the cause of plaintiff's classification, and he admits that the letter of plaintiff's attorneys of December 8, 1920, was sent as therein alleged and received at the War Department, and he avers that the Adjutant General by defendant's order did on the 18th day of December, 1920, answer the letter of plaintiff's counsel and did thereby inform plaintiff that a copy of the proceedings of the final classification board in his case would not be furnished him, but that he or his counsel might examine the record of such proceedings and that thereafter plaintiff's counsel did call at the War Department and examine the record of such proceedings. With respect to the allegations of the last sentence of said paragraph, defendants refers to paragraph ten of this answer, wherein his answer to the same is fully set forth.

7. In answer to the allegations of the seventh paragraph of the petition, defendant admits that the proceedings of the final classification board and of the board to determine the cause of classification were private, that no notice was given him of the convening of either, or of the personnel of said boards, or of the time when his case would be considered by either, but he denies that no opportunity was afforded plaintiff to be heard before either of said boards and avers that plaintiff was heard before those boards in that a complete record of the proceedings of the court of inquiry before which plaintiff was heard, containing a copy of the testimony, statements, and evidence by plaintiff and in his behalf, was submitted to and considered by each of said boards. With respect to the other allegations

of said paragraph, defendant is advised by counsel that the same are matters of law or argument which are not well pleaded and that he is not required to answer the same; and he therefore refrains therefrom.

8. In answer to the allegations of the first sentence of the eighth paragraph of plaintiff's petition, defendant avers that one member of the preliminary classification board had previously in the course of his duty made an adverse report upon plaintiff's efficiency and that previously in the course of his duty one member of the final classification board had made a like report and that previously in the course of his duty one member of the board to determine the cause of plaintiff's classification had sat as a member of a board administratively convened, which had classified plaintiff as a "misfit" for the duties he was then performing, but defendant denies that said officers or any of them were biased or disqualified from sitting on the several boards of which they were members, or from a fair performance of their duty as such. With respect to the allegations of the second sentence of said paragraph, defendant is advised by counsel that the same are matters of law or argument which are not well pleaded and that he is not required to answer the same; and he therefore refrains therefrom.

9. With reference to the allegations of the fourth and ninth paragraphs of plaintiff's petition concerning the alleged failure of this defendant to transmit or cause to be transmitted to the President the records of the proceedings of the court of inquiry and of
10 the final classification board and of the board to determine the cause of plaintiff's classification and concerning the alleged lack of consideration, review, or action of or upon the same by the President, defendant avers that prior to any determination or classification in plaintiff's case he laid before the President the whole matter of the procedure to be followed and the action to be taken in all cases of classification and determination under the provisions of section 24B, and received from the President then and there a general authority and direction that he, as Secretary of War, should in all such cases take such action in the name of the President and by his authority by way of approval, revision, or otherwise as from the circumstances shown by the record in each such case appeared to him to be right and proper, and that pursuant to such authority and direction so received by him from the President he, as Secretary of War, and W. R. Williams, Assistant Secretary of War, took the following action, which was in all respects in accordance with such directions of the President:

(1) The signing by this defendant, on behalf and by authority of the President, at the foot of the record of the final classification board, but prior to the submission of such record to the board to determine the cause of plaintiff's classification, of the following notation:

"Approved:
"BAKER,
"*Secretary of War.*"

(2) The signing by this defendant, on behalf and by authority of the President, at the foot of the record of the board to determine the cause of plaintiff's classification of the following notation:

"Majority report approved.
"BAKER,
"*Secretary of War.*"

(3) The reading by this defendant in person of the records of the preliminary classification board, the court of inquiry, the final classification board, and the board to determine the cause of classification in plaintiff's case, and the signing by W. R. Williams, Assistant Secretary of War, pursuant to instructions to that effect given him by this defendant after such reading, and on behalf of and by authority of the President, on November 17, 1920, subsequent to the action of the board to determine the cause of plaintiff's classification, of an instrument of approval, a copy of which is annexed to this answer and marked "Exhibit 1," which is prayed to be taken as a part hereof.

(4) The issuance on November 17, 1920, by order of this defendant, on behalf and by authority of the President, of a special
11 order discharging the plaintiff from the United States Army, of which a true copy, marked "Exhibit 2," is attached hereto and prayed to be taken as a part hereof.

With respect to the other allegations of the ninth paragraph of the petition, defendant is advised by counsel that the same are matters of law or argument which are not well pleaded and that he is not required to answer the same; and he therefore refrains therefrom.

10. In answer to the allegations of the tenth paragraph of the petition, so far as they are allegations of fact, defendant avers that in accordance with section 24B of the act of June 3, 1916, as amended June 4, 1920 (41 Stat., 759, 773), immediately upon the passage of the act of June 4, 1920, the President convened a board of not less than five general officers, as more fully set out in paragraph 7 of this answer, and shown by Exhibits 3 and 4, attached hereto, which are true copies, respectively, of the order convening said board and an order amendatory thereof, and which are prayed to be taken as a part hereof; that said board has been since its appointment, and is now, engaged in arranging all officers of the Army in two classes, namely, class A, consisting of officers who should be retained in the service, and class B, of officers who should not be retained in the service, and that said board, in accordance with said statute, provisionally arranged plaintiff in class B, and that plaintiff thereupon requested that a court of inquiry be convened before which he might be given an opportunity to appear, and that accordingly a court of inquiry was convened, before which plaintiff appeared in person, but stated he did not desire counsel; that in such court plaintiff was furnished with a full copy of the official records upon which his proposed classification was based, as has been more fully set out in paragraph 4 of this answer, and was given by and before said board full and

free opportunity to present testimony of himself and others in his behalf and to be heard fully, of which opportunities he availed himself so far as he desired; and that the record of such court of inquiry was forwarded to the final classification board for reconsideration of plaintiff's case, and after such consideration the final classification board placed plaintiff in class B, which action was approved as more particularly set forth in paragraph 9 of this answer, and that the President has not ordered further revision of said finding of said classification board, and that after plaintiff was placed in class B, aforesaid, a board of three officers was convened to determine whether such classification was due to his neglect, misconduct, or avoidable habits, as shown by Exhibits 5 and 6 attached hereto, which are true copies, respectively, of the order convening said board and an
12 order amendatory thereof, and which are prayed to be taken as a part hereof, and that the finding of a majority of said board was affirmative and of a minority of said board negative, and thereafter this defendant, acting on behalf and by authority of the President, approved said majority report, and that thereafter on November 17, 1920, by the order attached hereto as Exhibit 2, plaintiff was discharged from the Army in accordance with the statute hereinbefore cited and in all respects as provided by law.

Wherefore, having fully answered the allegations of plaintiff's petition, so far as he is advised by counsel it is necessary for him to answer, and having shown cause why the writ of mandamus should not issue against him as prayed in said petition, this defendant prays that he may hence be dismissed with his reasonable costs in this behalf sustained.

NEWTON D. BAKER,
Secretary of War.

JOHN E. LASKEY,
Attorney for the United States in and for the District of Columbia.
L. H. VANDOREN,
Assistant Attorney for the United States in and for the District of Columbia.
FREDERICK M. BROWN,
Judge Advocate, U. S. Army,
Of Counsel for the Defendant.
W. A. GRAHAM,
Judge Advocate, U. S. Army,
Of Counsel for the Defendant.
ARCHIBALD KING,
Judge Advocate, U. S. Army,
Of Counsel for the Defendant.

DISTRICT OF COLUMBIA, *ss:*

I do solemnly swear that I have read the foregoing answer by me subscribed, and know the contents thereof; and that the statements of facts therein made as upon personal knowledge are true, and those made as upon information and belief I believe to be true.

NEWTON D. BAKER.

Subscribed and sworn to before me this 25th day of January, 1921.
[SEAL.] JNO. B. RANDOLPH,
Notary Public, District of Columbia.

EXHIBIT 1.

In reply refer to A. G. 201—Creary, William F., Col. Inf.

War Department,
Washington, November 17, 1920.

The action of the classification board in finally classifying Colonel William F. Creary, Infantry, in class B is approved by the
13 President, and, by his direction a board of officers having determined that such classification is due to the officer's neglect, misconduct, and avoidable habits, Colonel Creary, is discharged from the service under the provisions of section 24*b*, of the act of Congress approved June 4, 1920.

(Signed) W. R. WILLIAMS,
Assistant Secretary of War.

EXHIBIT 2.

War Department,
Washington, November 17, 1920

Special Orders No. 271-O.
Confidential.

Extract.

69. Colonel William F. Creary, Infantry, having been finally classified in Class B for causes due to his neglect, misconduct, and avoidable habits, his discharge from the Army, by direction of the President, under the provisions of section 24*b* of the act of Congress approved June 4, 1920, is announced.

By order of the Secretary of War

PEYTON C. MARCH,
Major General, Chief of Staff.

Official:
P. C. HARRIS,
The Adjutant General.

EXHIBIT 3.

War Department,
Washington, D. C., June 12, 1920.

Special Orders No. 138-O.
Confidential.

Extract.

Par. 1. Paragraph 9, Special Orders 137-O (confidential), War Department, June 11, 1920, is amended to read as follows:

"Paragraph 33, Special Orders 134-O (confidential), War Department, June 8, 1920, is amended to read as follows:

"By direction of the President, a board of officers to consist of:
"Lieutenant General Robert L. Bullard, United States Army,
"Major General John F. Morrison, United States Army,
"Major General John Biddle, United States Army,
"Major General George W. Read, United States Army,
"Major General Charles P. Summerall, United States Army,
"Brigadier General Charles J. Bailey, United States Army,

is appointed to meet in this city at 10.00 a. m., June 14, 1920, or as soon thereafter as practicable, at the call of the senior mem-
14 ber thereof, and at such times thereafter as the senior member shall prescribe, for the purpose of making the classification of officers under the provisions of section 24*b*, chapter 1, act of Congress, approved June 4, 1920.

"The board will call on the classification and data section, personnel branch, Operations Division, General Staff, for such data as may be necessary for its deliberations.

"Major William H. Dodds, junior, General Staff, is detailed as recorder of the board, without vote.

"Such journeys as may be required of members of the board for the purpose indicated are necessary in the military service."

[A. G. 334, 4 Classification Bd.]

By order of the Secretary of War:

W. M. WRIGHT,
Major General, Acting Chief of Staff.

Official
P. C. HARRIS,
The Adjutant General.

EXHIBIT 4.

War Department,
Washington, October 19, 1920.

Special Orders No. 246-O.
Confidential.

Extract.

Par. 45. By direction of the President, Major General John L. Hines, United States Army, is detailed as a member of the board of officers appointed in paragraph 1, Special Orders No. 138-O, June 12, 1920, War Department, vice Major General Robert L. Bullard, United States Army, hereby relieved.

[A. G. 334, Officers' Classification Board.]

By order of the Secretary of War:

PEYTON C. MARCH,
Major General, Chief of Staff.

Official:
P. C. HARRIS,
The Adjutant General.

15 EXHIBIT 5.

Case No. —.

Proceedings of a board of officers convened pursuant to the following order:

War Department,
Washington, D. C., July 15, 1920.

Special Orders No. 165-O.
Confidential.

Extract.

By direction of the President, a board of officers to consist of

Brigadier General Andre W. Brewster, U. S. Army,
Colonel Grote Hutcheson, Cavalry,
Colonel Deane C. Howard, Medical Corps,

is appointed to meet in this city at 10.00 a. m. July 19, 1920, or as soon thereafter as practicable, at the call of the senior member thereof, and at such times thereafter as the senior member shall prescribe, for the purpose of determining whether or not officers were placed in class B due to their own neglect, misconduct, or avoidable habits, under the provision of section 24-*b*, act of Congress, approved June 4, 1920.

Captain Frederick D. Griffith, junior, General Staff, is detailed as recorder of the board, without vote.

Such journeys as may be performed by members of the board in attending the meetings of the board and in returning to their proper stations upon the conclusion thereof are necessary in the military service.

By order of the Secretary of War:

PEYTON C. MARCH,
Major General, Chief of Staff.

Official:
P. C. HARRIS,
The Adjutant General.

EXHIBIT 6.

War Department,
Washington, September 7, 1920.

Special Orders No. 210-O.
Confidential.

Extract.

72. The detail, by direction of the President, of Major Donald H. Connolly, General Staff, as recorder of the board of officers appointed by paragraph 39, Special Orders 165-O (confidential), July

15, 1920, War Department, for the purpose of determining whether or not officers were placed in class B due to their own neglect, misconduct, or avoidable habits, under the provisions of section 16 24-B, act of Congress, approved June 4, 1920, vice Major Frederick D. Griffith, jr., General Staff, as of September 3, 1920, is announced.

The travel directed is necessary in the military service.

By order of the Secretary of War:

PEYTON C. MARCH,
Major General, Chief of Staff.

Official:
P. C. HARRIS,
The Adjutant General.

Demurrer.

Filed January 31, 1921.

* * * * * * *

Comes now the relator, by his attorneys, and demurs to the answer of the respondent in the above entitled case and says that the same is bad in substance.

ANSELL & BAILEY,
T. T. ANSBERRY,
Attorneys for Relator.

Note.

Among the points of law to be argued in support of the foregoing demurrer are the following:

1. That the petition herein and the answer thereto show that the respondent, in discharging the relator from the Army of the United States, did so in plain disregard and violation of the statute and transcended his power and jurisdiction in so doing.

2. That it appears by the petition and the answer thereto that the relator was not furnished with a full copy of the official records upon which the proposed classification was based, as the statute mandatorily requires.

3. That the respondent has never caused the records of the proceedings of the court of inquiry convened in relator's case to be transmitted to the Judge Advocate General of the Army for his review or revision, as the statute requires.

4. That the respondent has never transmitted, or caused to be transmitted, to the President of the United States said record of said court of inquiry for his consideration and action, as the law requires.

5. That the President of the United States has never considered, revised, or acted upon said record of said proceedings, as the law requires.

17 6. That neither the finding of the final classification board nor the board of officers in the relator's case was ever submitted to or approved by the President of the United States, as the law requires.

7. That the relator was given no opportunity to petition the President of the United States for a revision of the finding of the final classification board nor of the board of officers convened to determine the cause of his final classification.

8. That the relator has not been discharged from the Army of the United States by act of the President.

9. That the President was without the lawful authority to delegate to the Secretary of War the power to approve the finding of the said final classification board, or the said board of officers, or to discharge the relator from the Army of the United States.

10. That the respondent was without legal authority to approve the finding of the said final classification board or the finding of the said board of officers.

11. That the respondent, in violation of the statute, did not inform the relator of the time of the convening of the final classification board to consider his case, or of the time of the convening of the board of officers to determine whether the final classification was due to relator's neglect, misconduct, or avoidable habits.

12. That the respondent did not give to the relator an opportunity to be heard or to present argument upon the law and the facts before the final classification board.

13. That the respondent did not afford the relator an opportunity to appear before or to produce testimony before the board of officers which was convened to determine whether the final classification was due to relator's neglect, misconduct, or avoidable habits, or an opportunity to offer argument upon the law and the pretended facts before such board of officers.

14. That the said answer shows that no sufficient, competent, or legal evidence was considered by the board of officers convened to determine whether the final classification was due to relator's neglect, misconduct, or avoidable habits.

15. That consideration of relator's case by the final classification board and the board of officers was in secret, without notice that it was being considered, and without any opportunity to relator to be heard.

16. That the said petition and answer show that the relator was not accorded due process of law in the proceedings had in his case.

17. That the action taken in relator's case by the final classification board and the board of officers is null and void, inasmuch as it appears by said answer that one member of the preliminary classi-

fication board had previously made an adverse report upon re-
18 lator's efficiency, one member of the final classification board had made a like report, and one member of the board of officers to determine the cause of relator's final classification had sat as a member of a board administratively convened which had classified relator as a "misfit" for the duties he was then performing and it also appearing that the reports of such officer were a part of the record considered by the said final classification board and the board of officers.

18. That the respondent was without legal authority to discharge the relator from the United States.

For other good and sufficient grounds of demurrer apparent on the face of the said answer.

Supreme Court of the District of Columbia.

Thursday, March 10, 1921.

Session resumed pursuant to adjournment, Mr. Chief Justice McCoy presiding.

* * * * * * *

It appearing to the court that the defendant herein, Newton D. Baker, Secretary of War, by resignation on the 5th day of March, 1921, vacated the office he held as such Secretary of War and was succeeded by John W. Weeks, and that it is essential to the protection of the plaintiff's rights in the above-entitled cause that said John W. Weeks be substituted in the stead of Newton D. Baker as the defendant in said cause, and counsel for the respective parties consenting thereto, it is by the court this the 10th day of March, 1921,

Ordered, That the said John W. Weeks, Secretary of War, be, and hereby is, substituted as defendant in said cause in place and stead of the said Newton D. Baker, who resigned from said office as such Secretary of War.

By the court:

WALTER I. McCOY,
Chief Justice.

I consent.

L. H. VAN DOREN,
Asst. U. S. Atty.

Memorandum of Court.

Filed March 12, 1921.

* * * * * * *

I have not been able to reach a decision on all points involved, but am of the opinion that the individual action of the President
19 upon findings of the final classification board is necessary. I therefore sustain the demurrer to the answer. An opinion covering all points may be filed later.

WALTER I. McCOY,
Chief Justice.

Supreme Court of the District of Columbia.

Saturday, March 12, 1921.

Session resumed pursuant to adjournment, Mr. Chief Justice McCoy presiding.

* * * * * * *

Upon hearing the demurrer of petitioner filed herein to the answer of respondent to rule issued in this cause, it is considered that said demurrer be, and it is hereby, sustained.

Rule to Show Cause.

Filed March 18, 1921.

* * * * * * *

On motion of Frederick M. Brown, of counsel for respondent, it is Ordered, That the petitioner herein show cause before this court on the 21st day of March, 1921, at ten o'clock in the forenoon of that day, why the memorandum decision made herein March 12, 1921, should not be revoked and annulled and why reconsideration of all the issues herein should not be had, and why petitioner's demurrer to the answer herein should not be overruled, and why the petition herein should not be dismissed. And it is

Further ordered, That service of a copy of this rule, if made on petitioner's attorneys on or before the 19th day of March, 1921, shall be sufficient.

WALTER I. McCOY,
Chief Justice Supreme Court.

Washington, March 18, 1921.

Answer to Rule to Show Cause.

Filed March 21, 1921.

* * * * * * *

Now comes the petitioner, William F. Creary, by his counsel, Ansell & Bailey, and in answer to the rule to show cause herein, says that the court ought not to have or take cognizance of
20 the matters and things contained in said rule to show cause for the following reasons, among others:

(1) The said rule to show cause is frivolous in that it is not based upon any alleged error either of law or of fact.

(2) It offends against the established rules of practice.

(3) It does not specify any grounds in support thereof.

(4) It does not ask for the vacation of the order sustaining the demurrer.

(5) It is multifarious, inconsistent, and asks for impossible relief.

(6) It can not be granted in its entirety, and therefore is bad in substance.

Further answering, the petitioner says that ample time and opportunity were afforded counsel representing the Secretary of War to prepare and present argument upon the points involved in the above-entitled cause. On January 3, 1921, the rule was issued against the Secretary of War and the cause was argued fully on January 28, 1921, the court placing no limit of time upon the argument of counsel. The court, at the conclusion of the oral argument, fixed five days for the filing of briefs by counsel representing the respective parties. These were filed. The Secretary of War is represented by four counsel.

Accordingly, it is submitted that no proper grounds exist for the granting of the alleged relief sought; and petitioner prays that said rule be discharged.

ANSELL & BAILEY,
Counsel for William F. Creary.

Supreme Court of the District of Columbia.

Monday, March 21, 1921.

Session resumed pursuant to adjournment. Mr. Chief Justice McCoy presiding.

* * * * * * *

Come now the parties hereto by their respective attorneys of record; thereupon the respondent moves the court to revoke and

annul the memorandum decision made herein March 12, 1921, to reconsider all the issues herein, to overrule the petitioner's demurrer to respondent's answer, and to dismiss the petition; it is considered that said motion be, and it is hereby, overruled without prejudice.

21 *Opinion.*

Filed March 26, 1921.

* * * * * * *

This is an application for a writ of mandamus directing the Hon. John W. Weeks, Secretary of War, substituted as respondent, to vacate an order discharging the relator from the Army of the United States and to restore him to his rank as colonel. A rule to show cause was issued. The respondent answered the petition and the relator demurred to the answer. The undisputed facts raise the questions upon which a decision must be based.

The proceeding calls for a construction of section 24*b* of the act of June 4, 1920, being "An act to amend an act entitled 'An act for making further and more effectual provision for the national defense, and for other purposes,' approved June 3, 1916, and to establish military justice." A copy of the section so far as it relates to the matter in controversy is as follows:

"Sec. 24*b*. Classification of Officers.—Immediately upon the passage of this act, and in September of 1921, and every year thereafter, the President shall convene a board of not less than five general officers, which shall arrange all officers in two classes, namely: Class A, consisting of officers who should be retained in the service; and class B, of officers who should not be retained in the service. Until otherwise finally classified, all officers shall be regarded as belonging to class A, and shall be promoted according to the provisions of this act to fill any vacancies which may occur prior to such final classification. No officer shall be finally classified in class B until he shall have been given an opportunity to appear before a court of inquiry. In such court of inquiry he shall be furnished with a full copy of the official records upon which the proposed classification is based and shall be given an opportunity to present testimony in his own behalf. The record of such court of inquiry shall be forwarded to the final classification board for reconsideration of the case, and after such consideration the finding of said classification board shall be final and not subject to further revision except upon the order of the President. Whenever an officer is placed in class B, a board of not less than three officers shall be convened to determine whether such classification is due to his neglect, misconduct, or avoidable habits. If the finding is affirmative, he shall be discharged from the Army; if negative, he shall be placed on the unlimited retired list with pay at the rate of 2½ per centum of his active pay multiplied by the number of complete years of commissioned service, or service which under the provisions of this act is counted as its equivalent, unless

his total commissioned service or equivalent service shall be less than ten years, in which case he shall be honorably discharged with one year's pay."

22 The relator was placed in class B by the classification board, and thereupon at his request a court of inquiry was convened before which he appeared without counsel. He was not furnished with a full copy of his record in the War Department, but was furnished with copies of the unfavorable parts of it. He was permitted in the court of inquiry to examine all the original record in the presence of the court while it was in session. The final classification board classed the relator in class B, and the board to determine whether such classification was due to his neglect, misconduct, or avoidable habits found in the affirmative, and the relator was discharged from the Army.

The relator did not have notice of the convening of the final classification board or of its action, nor did he have notice of the convening of the board to determine cause or of its action until he received notice of his discharge.

One member of the preliminary classification board had previously in the course of his duty made an adverse report upon relator's efficiency, and one member of the final classification board had made a like report, and previously in the course of his duty one member of the board to determine the cause of relator's classification had sat as a member of a board administratively convened which had classified relator as a "misfit" for the duties which he was then performing.

None of the proceedings were ever laid before the President, but before any action in the relator's case the respondent laid before the President the whole matter of the procedure to be followed and the action to be taken in all cases of classification and determination under the provisions of the statute and received from the President then and there a general authority and direction that the respondent should in all such cases take such action in the name of the President and by his authority and by way of approval, revision, or otherwise as from the circumstances shown by the record in each such case appeared to him to be right and proper. Pursuant to such authority and direction the original respondent as Secretary of War and the Assistant Secretary of War took action as follows:

(1) The signing by respondent at the foot of the record of the final classification board before submission of it to the board to determine the cause of relator's classification the following notation: "Approved, Baker, Secretary of War."

(2) The signing by the respondent at the foot of the record of the board to determine the cause of relator's classification the following: "Majority report approved, Baker, Secretary of War."

(3) Respondent read the records of all boards and of the court of inquiry, and thereupon the Assistant Secretary of War,
23 on his instruction, signed an instrument of approval reading: "The action of the classification board in finally

classifying Colonel William F. Creary, Infantry, in class B is approved by the President and by his direction, a board of officers having determined that such classification is due to the officer's neglect, misconduct, and avoidable habits, Colonel Creary is discharged from the service under the provisions of section 24*b* of the act of Congress approved June 4, 1920. (Signed) W. R. Williams, Assistant Secretary of War."

(4) A special order was issued by order of the original respondent discharging relator from the United States Army signed by the Chief of Staff and authenticated by The Adjutant General.

The statute must be construed in the light of the cases holding that the relator had no right of property in his office (Taylor vs. Beckham, 178 U. S. 548); that his appointment to it did not create a contract right (Butler vs. Pennsylvania, 10 How. 402); and that he enjoys a privilege revocable by the sovereignty at will (Crenshaw vs. United States, 134 U. S. 99). In short the statute constitutes the law of the case. (Reaves vs. Ainsworth, 209 U. S. 296; Ex parte Garland, 4 Wall. 333 at 378).

The relator contests the respondent's claim of authority to act in reviewing the finding of the final classification board and argues that the President alone was authorized to do so. The contention of the respondent is threefold:

(1) That the statute gives the President a mere privilege or option to intervene if he desires;

(2) That properly construed the statute indicates a purpose to require action by the Executive and not by the President personally;

(3) And that aside from such indicated purpose personal action by the President would not be necessary because no judicial act is involved in carrying into effect the purposes of the statute.

If it is optional with the President to order a revision of the proceedings either directly or through the Secretary, certainly they must be called to his attention so that he may exercise his option, as an option implies an opportunity. It can hardly be supposed that the classification board would be permitted to say "this case calls for revision and that case does not," and without some review of the proceedings no intelligent decision could be reached.

Quoting the statute where it says "the finding of said classification board shall be final and not subject to further revision except on the order of the President," respondent in his brief argues that the officer's classification is valid without direct or delegated presidential action. But the answer alleges the adoption of a plan of procedure with the approval of the President indicating that it was supposed that in each case the proceedings leading to the final classification should be reviewed, and in this case the claim is that the action in review of the proceedings was presidential action within the meaning of the statute.

24

It is intimated that the officer can ask for a consideration of the proceedings by the President, but in the present case the officer did

not know what the decision of the final classification board was until he had been dismissed from the Army. The War Department evidently thought that he had no right to petition the President, as it rendered final judgment without giving him the opportunity. Moreover the statute does not indicate an intention to constitute the President a court of appeals.

The third contention of the respondent is that a review personally by the President of the finding of the final classification board is not necessary because no judicial act is involved in carrying into effect the purposes of the statute.

In Runkle vs. United States, 122 U. S. 543, the Court says (page 557):

"There can be no doubt that the President, in the exercise of his executive power under the Constitution, may act through the head of the appropriate executive department. The heads of departments are his authorized assistants in the performance of his executive duties, and their official acts, promulgated in the regular course of business, are presumptively his acts. That has been many times decided by this court. (Wilcox v. Jackson, 13 Pet. 498, 513; United States v. Eliason, 16 Pet. 291, 302; Confiscation Cases, 20 Wall. 92, 109; United States v. Farden, 99 U. S. 10, 19; Wolsey v. Chapman, 101 U. S. 755, 769.) "Here, however, the action required of the President is judicial in its character, not administrative. As Commander in Chief of the Army he has been made by law the person whose duty it is to review the proceedings of courts-martial in cases of this kind. This implies that he is himself to consider the proceedings laid before him and decide personally whether they ought to be carried into effect. Such a power he can not delegate. His personal judgment is required, as much so as it would have been in passing on the case, if he had been one of the members of the court-martial itself. He may call others to his assistance in making his examinations and in informing himself as to what ought to be done, but his judgment, when pronounced, must be his own judgment and not that of another. And this because he is the person, and the only person, to whom has been committed the important judicial power of finally determining upon an examination of the whole proceedings of a court-martial, whether an officer holding a commission in the Army of the United States shall be dismissed from service as a punishment for an offense with which he has been charged, and for which he has been tried."

What the court held in substance was that the act of reviewing was judicial in its character not solely because the proceeding was judicial, but because the act of reviewing the findings of others based on evidence is essentially a judicial act. True the court quoted from the opinion of an Attorney General which emphasized the judicial nature of a court-martial proceeding from its inception and the importance of it to the officer involved, but the difference between a court-martial proceeding and the one involved here so far as the question of review is concerned is one of degree, the principal difference being that court-martial cases are strictly adversary—

that is to say they go on charges against the officer and may be followed by punishment. In both a hearing is had and evidence is considered. In both facts are found—in court-martial proceedings guilt or innocence, in proceedings like the present unfitness or fitness. In court-martial proceedings the judgment fixes the punishment if the officer is guilty; in the case now being considered the statute specifies the effect of the finding. It is said in Re Brodie, 128 Fed. Rep. 685, 668, a court-martial case: "The superior authority which orders a court-martial and to which its conclusions must be submitted for approval or disapproval is spoken of as the reviewing authority. *Its action being indispensable to a final conclusion or judgment, the reviewing authority is an essential component of the original tribunal,* and is not entirely a court of errors." [Italics supplied.]

The four cases cited in Runkle vs. United States, supra, which the court distinguished from the case before it are relied upon in respondent's brief. A statement of the facts in each will show that they are distinguishable from the present case. In Wilcox vs. Jackson, 13 Pet. 498, it appeared that certain lands were exempt from preemption if they had been reserved from sale by order of the President. Upon the order of the Secretary of War the land there in question had been set aside for use as a military reservation. The court says (page 513):

"The President speaks and acts through the heads of the several departments in relation to subjects which appertain to their respective duties. Both military posts and Indian affairs, including agencies, belong to the War Department. Hence we consider the act of the War Department in requiring this reservation to be made as being in legal contemplation the act of the President; and consequently that the reservation thus made was in legal effect, a reservation made by order of the President within the terms of the act of Congress."

26 In United States vs. Eliason, 16 Pet. 291, it appeared that an officer was claiming allowances under an Army regulation which the Secretary of War had rescinded. The court says (page 302):

"* * *; and the question propounded to the Circuit Court was neither more nor less than this, whether a subordinate officer of the Army, insisting upon a prior regulation, which he thinks either is or ought to be in force, shall obtain from the Government emoluments which a subsequent order from his superior had warned him that it was not in his power to require?"

In the Confiscation Cases, 20 Wall. 92, the statute in question gave the President the power "to cause the seizure" of certain property. The court said that this implied that the seizure was to be made by agents of the President and, following Wilcox vs. Jackson, supra, that the direction of the Attorney General to make the seizure must be regarded as a direction given by the President, but that whether this be so or not it was sufficient that the information

averred that the seizure was made by virtue of the act of Congress and must therefore have been caused by the President.

In United States vs. Farden, 99 U. S. 10, the court says (page 19):

"Under the tenure of office act the President had the power at that time, which was during the recess of the Senate, to suspend the collector until the next session of the Senate, and the act of the Secretary, the head of the Treasury Department, is presumed to be the act of the President. (Wilcox vs. Jackson, 13 Pet. 498)."

The suspension had not been ordered by the Secretary, however, but by the supervisor of an internal revenue district, upon whom the law expressly conferred the power to suspend.

Wolsey vs. Chapman, 101 U. S. 755, was a case of the reservation from sale of public lands and the case followed Wilcox vs. Jackson, supra, the court saying (page 769):

"The truth is, there can be no reservation of public lands from sale except by reason of some treaty, law, or authorized act of the executive department; and the acts of the heads of departments, within the scope of their powers, are in law the acts of the President. * * *."

The respondent cites several cases in addition to those mentioned above, but while the facts in no two of them are alike, they apply the rule of the cases cited in Runkle vs. United States, supra, and only three of them will be mentioned here.

United States vs. Chicago, Milwaukee and St. Paul Railway Co., 218 U. S. 233, is one of the cases principally relied upon by the respondent.

In that case it appears that an act of Congress approved March 3, 1887, as amended, provided for the adjustment of land grants theretofore made in aid of the construction of railroads. If on
27 completion of the adjustment it appeared that lands had been erroneously certified or patented to the railroad by the United States a reconveyance was to be demanded to be followed by appropriate proceedings in case of refusal. If any land had been sold by the grantee company to purchasers in good faith, demand was to be made for payment of an amount equal to the Government price for similar lands. This action was brought under that act.

The grant to the railroads was of the familiar type—place lands and lieu lands. Lands previously reserved to the United States for any purpose by any act of Congress were excepted from the grant. The defendant or its predecessor in interest by completion of its line and filing maps as required converted its inchoate title into a complete title.

The Government contended that before the passage of the act under which defendant claimed the lands in dispute they had been reserved under the swamp-land act of September, 1850, which granted swamp lands to the States and so were not within the grant to the defendant. The contention of the defendant was that these lands were not in fact swamp lands granted by the act of 1850, and that

therefore nothing done under the act could avail the State except a decision by competent authority in due form that the lands were in fact within the class of swamp lands mentioned in the act of 1850.

The court then quotes the act of 1850, which was one giving to the States swamp and overflowed lands which answered a certain description. It made it the duty of the Secretary of the Interior as soon as practicable to plat the kind of lands covered by the statute and to transmit the plats to the governor of the State in which they were located, and on his request to issue patents to the State. The proceeds of the sale by the States of the lands were to be used, as far as necessary, by the States for reclaiming the lands. In 1876 the State of Iowa, or some of the counties therein, claimed the lands as swamp lands, and the defendant's predecessors claimed them as place lands under the grant to them. The Commissioner of the General Land Office, upon public hearings on those claims after notice to all the parties, held that the lands in dispute were not swamp lands within the meaning of the act of 1850 and that the State of Iowa had never been entitled to them thereunder. This hearing was held not under the act of 1850 but under an act of Congress approved March 5, 1872, ch. 39, 17 Stat. 37, which provided:

"That the Commissioner of the General Land Office is hereby authorized and required to receive and examine the selections of swamp lands in Lucas, O'Brien, Dickinson, and such other counties in the State of Iowa as formerly presented their selections to
28 , the surveyor general of the district including that State, and allow or disallow said selections, and indemnity provided for according to the acts of Congress in force touching the same at the time such selections were made, without prejudice to legal entries or the rights of bona fide settlers under the homestead and preemption laws of the United States prior to the date of this act."

The court held that the commissioner's decision under the act of 1872 was final, adding:

"In any view, that decision was in contemplation of law one by the Secretary of the Interior, who, by the original act of 1850, was directed to make out accurate lists or plats of the lands described by that act as swamp and overflowed lands. (Wilcox vs. Jackson, 13 Pet. 498; Wolsey vs. Chapman, 101 U. S. 755, 768.)"

The court did not hold that the hearing before the Commissioner of the General Land Office was had under authority delegated by the Secretary of the Interior because the act of March 5, 1872, expressly conferred upon the Commissioner of the General Land Office jurisdiction to hear and determine, and a decision by the Secretary would have been without jurisdiction. And deciding that the facts were conclusively established by the finding of the commissioner under the act of 1872, the court then says "*In any view* [italics supplied] the decision by the commissioner was good under the act of 1850." The court then goes on to speak of the hearing above mentioned, but does not say that it was under the act of 1850, nor could it so hold, as hear-

ings were not provided for under that act. Selections under the act of 1850 "constituted a determination based on observation and examination that the lands were not swamp and overflowed, etc." (McCormick vs. Hayes, 159 U. S. 332, 347; Railroad Co. vs. Smith, 76 U. S. 95, 100. The Secretary could not be compelled to proceed under the act. (French vs. Fyan, 93 U. S. 196.)

The case of the United States vs. Chicago, Milwaukee and St. Paul Ry. Co. therefore is not one of delegated authority.

In William vs. United States, 1 How. 290, it was shown that the President was authorized to make advances to various disbursing officers as might seem necessary to permit the discharge of their functions. The disbursing officer in this case was a United States marshal. The President in writing authorized the Secretary of the Treasury to make the advances. The court said that it was the duty of the President to superintend administrative officers, not to be himself the sole administrative officer. To the same effect is United States vs. Freeman, 3 How. 555, which was also a case of disbursing public moneys, in this instance for double rations to be allowed "as the President of the United States shall from time to time direct having respect to the especial circumstances of each post."

29 By the Army Regulations the President delegated the administration of this act to the Secretary of War.

The decision in re Brodie, 128 Fed. 833, is not in conflict with the views expressed above. There the court held that no statute forbidding it was competent for the President, through the Secretary of War, to establish rules and regulations laid down in the manual for court martial. Fixing a run for guidance of departmental action in matters of procedure obviously does not require the direct personal attention of the President, otherwise he would be the sole administrative officer. (Williams vs. United States, supra; of the War Department.

In the act under consideration it appears that where Congress intended to allow the delegation of authority conferred on the President it used apt words for the purpose, for section 5 contains the following: "The Chief of Staff shall preside over the War Department General Staff and *under the direction of the President, or of the Secretary of War under the direction of the President*, shall cause to be made," etc. [Italics supplied.]

The conclusion is that the President's individual action is called for in consideration of the findings of the final classification board.

The relator complains that he was not furnished with a full copy of the official records on which the proposed classification was based, but he did not so far as shown demand a copy of his entire record before the court of inquiry convened at his request nor object to proceeding without it. There was jurisdiction of the subject matter and of the person, and it must be held that the relator by proceeding without protest can not now object. (See Bishop vs. United States, 197 U. S., 334-340.)

The contention of the relator that he was entitled to a hearing before the final classification board can not be sustained. There is nothing in the statute indicating that Congress intended that there

should be a hearing preliminary to final classification except that before the court of inquiry. That court, it is true, had no power to make findings or to determine anything, but it is a fair inference that where Congress has provided for a certain sort of hearing during the classification proceeding none other can be had.

There is nothing in the statute to indicate that the action by the classification board can be challenged if a member has previously expressed an opinion as to the officer's fitness. This conclusion would follow from the holding that a hearing before these boards is not a matter of right. It has been held by most respectable authority that a judge may sit on an appeal in a case heard by him in the first instance. (Pierce vs. Delamater, 1 N. Y., 17; Biggins vs. Lambert, 213 Ill., 625.) It is quite obvious why an officer should fear results if his case may be passed on by one who has prejudged him—especially as all the board may have done so; but any unfairness in that respect may be corrected by order of the President. (See Reaves vs. Ainsworth, 219 U. S., 296, 306.)

As the statute speaks of the convening of only one classification board it seems that two boards were not contemplated. It used the words "final classification board," but it also says that after the taking of testimony before the court of inquiry the record of that court shall be sent to the final classification board for "reconsideration" of the case. It seems that the word "consideration" would have been used were separate boards intended.

The relator claims that he was entitled to a hearing before the board to determine cause.

The act provided for two proceedings, one leading to the classification for unfitness and the other to determine cause. The respondent so construed the statute for he passed upon the finding of the former before sending the case to the latter.

The provision in respect to the duty of the board to determine cause is the most difficult to interpret. It reads, to quote it again, "Whenever an officer is placed in class B a board of not less than three officers shall be convened to determine whether such classification is due to his neglect, misconduct, or avoidable habits." Literally read it seems to require the board to say what was the mental operation of the final classification board, but that would be an unreasonable interpretation. It must have been intended that the board should determine whether the unfitness for service which was the reason for placing the officer in class B was due to any of the causes mentioned.

Taking the purpose of the statute to be as stated, the important question to be decided is whether it was intended that the board to determine cause is to consider only the officer's record as it was before the final classification board or whether he is to be given a hearing. To reach the conclusion that the former course was contemplated the objection must be met that the final classification board had the record and could just as will have been given the power to decide and so avoid duplication of work. To which it may be replied that effects are more obvious than the causes of them and that the latter call for more careful study; also that retirement from

the service of those who are unfit calls for speedier action so that the Army shall be properly officered, and therefore the intention of Congress was that the final classification board should not be held back in accomplishing its work by having to determine cause. Other reasons might be assigned perhaps to support respondent's contention. But such contentions assume that Congress had in
31 mind that the board to determine cause would have before it all the officer's paper record and the report of his testimony before the court of inquiry and that these would contain all that could be adduced as to the cause of his unfitness. To support this conclusion it must be argued further that Congress assumed that the officer's paper record sent to the court of inquiry would in every case inform the officer not only of the respects in which he was deemed unfit but of the discreditable causes which it would be later claimed brought about that unfitness—an assumption which can not be made when cases can be readily imagined in which it would not be likely to accord with the facts or at least possibly would not, for instance, — cases of nervous breakdown.

But what about the officer who has not demanded a hearing before a court of inquiry because he admits unfitness warranting his being placed on the retired list? It is argued that he takes his risk in not asking for a court of inquiry, which is for all practical purposes to say that every class B officer will be forced to demand an opportunity to appear before such a court though not conscious of any wrong-doing—almost a confession. If he does not ask to be heard before a court of inquiry, he may not know what his paper record shows, and until he receives notice of his discharge from the Army for causes of which he was not notified, he may not know that anyone even suspected him of misconduct. When he has received his order of discharge, if the practice followed in the present case is adopted, he will not have been informed of the charges and may be entirely ignorant of what they were. If Congress intended a procedure that might lead to any such result, certainly it would have made its intention obvious.

As Congress did not explicitly say that there should be a hearing before the board to determine cause the question is not free from difficulty, but as we have the outstanding fact that an officer of the Army may be discharged in effect on charges to his discredit and without honor on an adverse finding of the board, it is more reasonable to infer that Congress intended that an officer should have whatever rights any public officer has where causes for removal are specified. In Reagan vs. United States, 182 U. S. 419, 425, the court says:

"The inquiry is therefore whether there were any causes of removal prescribed by law, March 1, 1895, or at the time of the removal. If there were, then the rule would apply that where causes of removal are specified by constitution or statute, as also where the term of office is for a fixed period, notice and hearing are essential. If there were not, the appointing power could remove at pleasure or for such cause as it deemed sufficient."

32 In Shurtleff vs. United States, 189 U. S. 311, the court says (page 314):

"It must be presumed that the President did not make the removal for any cause assigned in the statute, because there was given to the officer no notice or opportunity to defend."

And at page 317:

"We are not unmindful of the force of the contention that, if the power of removal is not limited to the causes specified in the statute, that then those words providing for a removal for inefficiency, neglect of duty, or malfeasance in office, fulfill no function, because without them the President has unlimited power of removal, and with them he still has the same power.

"It may be said, however, that there is some use for the provisions for removal for the causes named in the statute. A removal for any of those causes can only be made after notice and an opportunity to defend, and therefore, if a removal is made without such notice, there is a conclusive presumption that the officer was not removed for any of those causes, and his removal can not be regarded as the least imputation on his character for integrity or capacity * * *."

In Kalbfus vs. Siddons, 42 App. D. C. 310 at 318, the court says:

"* * * When, therefore, Congress uses this language [shall not be removed except for inefficiency, neglect of duty, or malfeasance in office], it limited the right of removal in the commissioners to the causes specified, and notice and hearing thereafter were requisites to the exercise of their jurisdiction * * *."

And further quoting 2 Dill. Mun. Corp. 5th Ed. Sec. 480:

"The proceedings in all cases where the amotion is for cause is adversary or judicial in its character; and if the organic law of the corporation is silent as to the mode of procedure, the substantial principles of the common law as to proceedings affecting private rights must be observed."

It must be held that the relator was entitled to notice of the charges against him and to a hearing before the board to determine cause.

Something more than is alleged in the petition must be shown to raise a question of bias on the part of a member of the board to determine cause. An officer may be a "misfit" and another officer may think so and still be of the opinion that the conduct of the former has been unexceptionable so far as its moral quality is concerned. The answer denies bias.

That the relator might have been discharged under the 118th article of war is not to the point. He was not discharged under that authority.

There is no requirement in the statute of a reference to the Judge Advocate General so as to make action by him a preliminary to a decision under the act here in question.

No interpretation of the statutes said to be in pari materia that has been called to the court's attention is in conflict with the foregoing conclusions.

WALTER I. McCOY,
Chief Justice.

Memorandum of Court.

Filed April 11, 1921.

* * * * * * *

Section 399 of the code is broad enough to permit the amendment of an answer to a petition for a writ of mandamus.

As this matter stands, a motion should be made accompanied by the proposed answer if the respondent wishes to amend.

WALTER I. McCOY,
Chief Justice.

Motion for Leave to File Answer.

Filed April 20, 1921.

* * * * * * *

Now comes John W. Weeks, appearing herein specially for the purpose of making this motion and not appearing herein otherwise, and moves this court, upon his affidavit hereto annexed, verified the 16th day of April, 1921, and upon all the papers and proceedings herein, for an order permitting him to file herein the answer, a copy whereof is hereto annexed.

(Signed) FREDERICK M. BROWN,
Attorney for John W. Weeks,
Appearing Herein Specially.

Affidavit of John W. Weeks.

* * * * * * *

John W. Weeks, being duly sworn, deposes and says as follows:

1. I have to-day been informed that my name has, by order of the court, been substituted for that of Newton D. Baker as party defendant herein. I had no previous information of there being any action pending against me personally.

2. I have not been served with a summons or other process of the court herein, nor have I at any time had notice of any motion to substitute me for Newton D. Baker as the party defendant
34 herein. I have not heretofore conferred upon anyone authority to enter my appearance or to represent me in this ac-

tion or to consent to my being substituted for Newton D. Baker as the party defendant herein.

3. I am unwilling to appear voluntarily herein unless I am permitted to file the answer of which a copy is hereto annexed and made a part hereof; but I am desirous of entering a voluntary, general appearance and of being represented by the United States attorney in case permission to file said answer is granted by the court. I am unwilling to accept as my answer herein the answer heretofore filed herein by and in the name of Newton D. Baker. Should the court refuse permission to file the answer, a copy whereof is hereto annexed, I desire that I be served with such summons, process, or notice as shall be deemed appropriate to cast upon me the duties and obligations of a party defendant, in case it is intended to continue the action and to enter final judgment therein.

4. I have authorized Frederick M. Brown, colonel, judge advocate, United States Army, to appear specially herein on my behalf in order to move for an order permitting me to file the answer, a copy whereof is hereto annexed; and to stipulate that the filing of such answer shall constitute a general appearance herein.

JOHN W. WEEKS.

Sworn to before me this the 16th day of April, 1921.

[SEAL.]

F. A. ALLMUTH,
Notary Public, District of Columbia.

My commission expires Feb. 27, 1924.

Answer of Defendant, John W. Weeks, Secretary of War, to Petition for Mandamus and to Rule to Show Cause.

* * * * * * *

John W. Weeks, Secretary of War, now and at all times saving and reserving unto himself all exceptions to the imperfections, uncertainties, and defects in the petition for writ of mandamus filed herein, and reserving unto himself the benefit of the lack of jurisdiction of the court, appearing on the face of said petition, to grant the relief prayed for, and the lack of jurisdiction of the court to direct him, as Secretary of War, to perform the act in question, and relying on the same, as if demurrer had been specifically interposed, for answer to said petition, or so much thereof as is material, and to said rule to show cause, says on information and belief as follows:

1. Defendant admits that the allegations contained in the first paragraph of the petition were true at the time of the filing thereof.

35 2. As to the matters alleged in the second paragraph of the petition, defendant admits the making of findings of moral, professional, and physical fitness upon which petitioner was appointed and commissioned first lieutenant, captain, major, and lieutenant colonel of Infantry, respectively; but defendant denies the

materiality of the allegations that such findings or any of them were duly or correctly made, and denies any knowledge or information as to the truth and fact in that regard. Defendant alleges that the present standard of professional fitness to qualify an officer to become or to remain a colonel or Infantry is very much higher than the standards of fitness which were applicable to the grades of first lieutenant, captain, major, and lieutenant colonel, respectively, at the several times when findings of petitioner's professional fitness for these grades were made as aforesaid. Defendant further alleges that petitioner's commission of 27 December, 1919, as lieutenant colonel was not in the 5th, or in any particular regiment, but was a commission as lieutenant colonel of Infantry, and that petitioner's commission of 20 July, 1920, as colonel was a temporary commission granted in virtue of a recess appointment by the President, which appointment has not been followed by nomination to and confirmation by the Senate of the United States. Said commission was to expire not later than at the end of the next session of the Senate. Defendant thereupon avers that petitioner's tenure of the office of colonel in the Army of the United States has expired by constitutional and statutory limitation of the term thereof, and that neither defendant nor this court nor both have power to make petitioner a colonel or to restore him to the office of colonel as prayed by petitioner herein. Defendant further alleges that petitioner has never received a permanent appointment, or been permanently commissioned a colonel on the active list of the Regular Army. Defendant denies that petitioner as an officer has always rendered efficient service and alleges petitioner's services, prior to his being discharged in virtue of the order of November 17, 1920, mentioned in the second paragraph of the petition, were not such as to justify the expectation that his services, if retained on the active list of the Regular Army, would be of the standard of efficiency and professional skill required of officers of the grade of colonel of Infantry in the Regular Army. Respondent thereupon avers that petitioner's past services and his probable prospective services were not such as to justify retaining him on the active list of the officers of the United States Army under the terms of section 24*b* of the Army reorganization act of June 4, 1920. Defendant further alleges that petitioner has at times been guilty of neglect of duty, misconduct, or disqualifying habits, and that, in accordance with the requirements of section 24*b* of said act of
36 Congress, it has been, to wit, prior to the order of November 17, 1920, quoted in the second paragraph of the petition, duly found and determined that petitioner had been guilty of neglect, misconduct, and avoidable habits causing his being classified in class B. Defendant admits the remaining matters alleged in the second paragraph of the petition.

3. As to the matters alleged in the third paragraph of the petition, defendant admits and alleges that a court of inquiry was convened by the President to investigate the question whether petitioner should be continued in class B and to investigate and consider, in respect of the status of petitioner, all other facts and questions which, by statute

or otherwise, said court of inquiry was required or permitted to investigate or consider and also to take testimony, collect evidence, and hear argument pertinent to said facts and questions; and defendant alleges upon information and belief that said court of inquiry actually investigated said facts and considered said questions and performed all and singular its other duties aforesaid. Defendant admits the remaining matters alleged in the third paragraph of the petition.

4. As to the matters alleged in the fourth paragraph of the petition, defendant alleges that prior to, or in the said court of inquiry, a full copy of all unfavorable reports, notations, or papers either considered by the provisional or original classification board in petitioner's case or afterwards considered by the final classification board therein or by the board convened to determine the cause of classification was delivered to petitioner for him to retain permanently and to carry away and to become his property; and that the same were the only records upon which his provisional and final classification in class B were based or proposed to be based and upon which the findings or determinations of said three boards or any of them were based. Defendant further alleges that in said court of inquiry a full copy of the entire record of petitioner's service as an officer of the Army from the date of his first commission therein to the date of the convening of said court was placed at petitioner's disposition or was tendered to him to examine, study, copy, and otherwise use, with full opportunity to use said full copy in uninterrupted and confidential consultation with counsel or with any one whom he might desire to consult, and that petitioner had the full, perfect, and complete use of all said records, to all intents and purposes of equal benefit and advantage to petitioner, in respect of the protection of his interests or rights as an officer on the active list of the Regular Army, as if he had been made the sole owner and possessor thereof or a copy thereof; but that, except for the unfavorable reports, notations, and papers aforesaid, petitioner was not permitted to carry said records away or to treat them as his own property. Thereupon de-
37 fendant avers that petitioner has been furnished with a full copy of all official records relating to his services within the intent and meaning of the statute aforesaid. Defendant further alleges that no demand for the furnishing to him of other or more complete records, documents, or papers, or copies thereof, was made by or on behalf of petitioner in the court of inquiry; nor was any protest or objection to the sufficiency of the records, documents, and papers that were actually furnished to him made by, or on behalf of, the petitioner in said court of inquiry, nor has any such demand, protest, or objection been made at any time before the institution of the action herein. Defendant further avers that the mandate and requirements of said statute have been, in all respects, complied with and carried into effect and that the proceedings mentioned in the fourth paragraph of the petition are valid and effectual. Defendant admits that the record of proceedings in the court of inquiry has not been transmitted to the Judge Advocate General and has not been received or reviewed by him. Defendant admits and alleges that no officer or board of officers has been advised of the illegal

character of the proceedings of the court of inquiry and alleges that said proceedings were in fact not illegal, but were valid, regular, and legal. Defendant admits that the record of said proceedings has not been transmitted to the President personally and has not been considered, reviewed, or acted upon personally by him, but defendant alleges that said record was duly transmitted, considered, reviewed, and acted upon in manner directed and authorized by the President of the United States; as hereinafter, to wit, in the ninth paragraph hereof, more fully and at large appears. Defendant denies all and singular the remaining matters alleged in the fourth paragraph of the petition.

5. As to the matters alleged in the fifth paragraph of the petition, defendant alleges that petitioner at no time requested that he be given notice of the acts or proceedings in said paragraph mentioned and defendant admits that such notices were, in fact, not given. Defendant alleges that petitioner had ample opportunity to petition the President for a revision of any or all of said proceedings or for any other action by the President to which petitioner might have conceived himself entitled. As to the remaining matters alleged in said fifth paragraph of the petition, defendant has no knowledge nor any information sufficient to form a belief and demands strict proof thereof, if material.

6. As to the matters alleged in the sixth paragraph of the petition, defendant admits that no notice was given petitioner of the meeting of the final classification board or of the board of officers to determine the cause of petitioner's classification, and he ad-
38 mits that the letter of the petitioner's attorneys of December 8, 1920, was sent as therein alleged and received at the War Department, and he alleges that The Adjutant General did on the 18th day of December, 1920, answer the letter of petitioner's counsel and did thereby inform petitioner that a copy of the proceedings of the final classification board in his case would not be furnished him but that he or his counsel might examine the record of such proceedings and that thereafter petitioner's counsel did call at the War Department and examine the record of such proceedings. Defendant admits that the final classification board held and decided in effect that petitioner should be eliminated from the active service of the Army and that the board convened to determine the cause of classification held and decided in effect that petitioner should be absolutely discharged from the office in the Army, but defendant denies that said determination or either of them were made or influenced by the orders of the original defendant herein. Defendant admits that Special Order No. 271-O of November 17, 1920, set forth in the second paragraph of the petition was the order of the original defendant herein. Defendant denies all and singular the remaining matters alleged in the sixth paragraph of the petition.

7. As to the matters alleged in the seventh paragraph of the petition, defendant admits that the proceedings of the two boards therein mentioned, to wit, the final classification board and the board convened to determine the cause of classification were had without notice

to petitioner or opportunity to be heard in the actual presence of either of them and defendant alleges that petitioner asked no opportunity to be heard in the actual presence of said boards, or either of them; but defendant alleges that petitioner's case was duly presented to each of those boards and that hearings were granted to petitioner and were had by said boards respectively, in that testimony, statements, and evidence adduced by petitioner and on his behalf in the court of inquiry, together with a copy of all other proceedings in the court of inquiry in petitioner's case, were submitted to and considered by each of said boards. Defendant denies the remaining matters alleged in the seventh paragraph of the petition.

8. As to the matters alleged in the eighth paragraph of the petition, defendant alleges that one member of the provisional or preliminary classification board had previously in the course of his duty made an adverse report upon petitioner's efficiency, and that previously in the course of his duty one member of the final classification board had made a like report, and that previously in the course of his duty one member of the board, to determine the cause of petitioner's classification, had sat as a member of a board administratively convened, which had characterized petitioner as a "misfit" for the duties he was then performing, but defendant denies that said officers or any of them were biased or disqualified from sitting on the several boards of which they were members or from a fair performance of their duty as such. Defendant denies all and singular the remaining matters alleged in the eighth paragraph of the petition.

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9. As to the matters alleged in the ninth paragraph of the petition, defendant admits that neither he nor the original defendant herein has caused the record of the proceedings of said court of inquiry, of the final classification board, or of the board convened to determine the cause of classification to be transmitted to the President, and he admits that said proceedings have not been reviewed, considered, or acted upon personally by the President. Defendant alleges that prior to any determination or classification in petitioner's case the original defendant laid before the President the whole matter of procedure to be followed and the action to be taken in all cases of classification and determination under the provisions of section 24*b*, and he received from the President general instructions, directions, and authority in substance and to the effect that, except as to cases wherein he, the said Secretary of War, should at any time conclude that personal attention and consideration by the President ought to be had in virtue of the importance of the matter or for any other reason, the said Secretary of War should take such action in the name of the President and by his authority by way of approval, revision, or otherwise as from the circumstances shown by the record in each such case appeared to him, the said Secretary of War, to be right and proper. Pursuant to such authority and direction so received by the original defendant herein from the President, he, as Secretary of War, after due consideration concluded that the case of the petitioner herein did not by reason of its importance, or for any

other reason, merit the personal attention and consideration of the President. The said Secretary of War thereupon took the following action, which was in all respects in accordance with such directions of the President:

(1) The signing by the original defendant, on behalf and by authority of the President, at the foot of the record of the final classification board, but prior to the submission of such record to the board to determine the cause of petitioner's classification, of the following notation:

"Approved:
"BAKER,
"*Secretary of War.*"

(2) The signing by the original defendant, on behalf and by authority of the President, at the foot of the record of the board to determine the case of petitioner's classification, of the following notation:

"Majority report approved:
"BAKER,
"*Secretary of War.*"

(3) The reading by the original defendant in person of the records of the preliminary classification board, the court of inquiry, the final classification board, and the board to determine the cause of classification in petitioner's case, and the signing by W. R. Williams, Assistant Secretary of War, pursuant to instructions to that effect given him by the original defendant after such reading, and on behalf of and by authority of the President, on November 17, 1920, subsequent to the action of the board to determine the cause of petitioner's classification, of an instrument of approval, a copy of which is annexed to the original answer and marked "Exhibit 1," which is prayed to be taken as a part hereof.

(4) The issuance on November 17, 1920, by order of the original defendant on behalf and by authority of the President of a special order discharging petitioner from the United States Army, of which a true copy, marked "Exhibit 2," is attached to the original answer herein and made a part hereof. Defendant denies all and singular the remaining matters alleged in the ninth paragraph of the petition.

10. Defendant denies the allegations and conclusions of law contained in the tenth paragraph of the petition. He alleges that the acts and proceedings of which petitioner complains and which he erroneously characterizes as unlawful were essentially the following:

Immediately after the enactment of the act of Congress of June 4, 1920, and in accordance with section 24*b* thereof the President convened a board of not less than five general officers, as shown by Exhibits 3 and 4, attached to the original answer herein which are true copies respectively of the order convening said board and an order amendatory thereof, said board has been since its appointment

and is now engaged in arranging all officers of the Army in two classes, namely, class A, consisting of officers who should be retained in the service, and class B, of officers who should not be retained in the service, and said board in accordance with said statute provisionally arranged petitioner in class B, and petitioner thereupon requested that a court of inquiry be convened before which he might be given an opportunity to appear, and accordingly a court of inquiry was convened before which petitioner appeared; in such court petitioner was furnished with a full copy of the official records upon which his proposed classification was based, as *had* been more fully set out in paragraph 4 of this answer, and was given by and before said board full and free opportunity to present testimony of
41 himself and others in his behalf and to be heard fully, of which opportunities he availed himself so far as he desired. The record of such court of inquiry was forwarded to the final classification board for reconsideration of petitioner's case, and after such consideration the final classification board placed petitioner in class B, which action was approved as more particularly set forth in paragraph 9 of this answer. The President has not ordered further revision of said finding of said classification board; but in the manner more particularly set forth in the ninth paragraph hereof, the President has decided not to order further revision thereof. After petitioner was placed in class B as aforesaid, a board of three officers was convened to determine*d* whether such classification was due to his neglect, misconduct, or avoidable habits, as shown by Exhibits 5 and 6 annexed to the original answer herein which are true copies, respectively, of the order convening said board and an order amendatory thereof, and which are made a part hereof. The finding of a majority of said board was affirmative, that is to say, that the classification of petitioner in class B was due to his neglect, misconduct, or avoidable habits; and the finding of one member of said board, negative. Thereafter the original defendant, acting on behalf of and by authority of the President approved said majority report, and subsequently, to wit, on November 17, 1920, by the order, a copy whereof, marked "Exhibit 2," is annexed to the original answer herein and made a part hereof, petitioner was discharged from the Army in accordance with the statute hereinbefore cited and in all respects as provided by law.

Wherefore, having fully answered the allegations of plaintiff's petition, so far as he is advised by counsel that it is necessary for him to answer, and having shown cause why the writ of mandamus should not issue as prayed in said petition, this defendant prays that he may hence be dismissed with his reasonable costs in this behalf sustained.

(Signed) JOHN W. WEEKS,
Secretary of War.

JOHN E. LASKEY,
Attorney for the United States
in and for the District of Columbia.
L. H. VAN DOREN,
Assistant Attorney for the United States
in and for the District of Columbia
FREDERICK M. BROWN,
Judge Advocate, U. S. Army,
Of Counsel for the Defendant.

42 DISTRICT OF COLUMBIA, *ss:*

I do solemnly swear that I have read the foregoing answer by me subscribed, and know the contents thereof; and that the statements of fact therein made I believe to be true.

(Signed) JOHN W. WEEKS.

Subscribed and sworn to before me this 16th day of April, 1921.

(Signed) F. A. ALLMUTH,
Notary Public, District of Columbia.

My commission expires Feb. 27, 1924.

Notice.

* * * * * * *

Messrs. Ansell & Bailey,
Attorneys for Petitioner:

Take notice that the aforegoing motion will be for hearing at — on the 22nd day of April, 1921, at 10.00 a. m., or as soon thereafter as counsel may be heard.

Washington, April 18, 1921.

(Signed) FREDERICK M. BROWN,
Attorney for John W. Weeks,
Appearing Herein Specially.

Memorandum Opinion.

Filed May 23, 1921, as of April 22, 1921.

* * * * * * *

A motion was made upon the affidavit of the respondent verified April 16, 1921, and upon all the papers and proceedings herein for an order permitting him to file an answer. The notice of motion reads in part "Now comes John W. Weeks appearing herein specially for the purpose of making this motion and not appearing otherwise, etc." The court declined to entertain the motion because of the form of the appearance.

WALTER I. McCOY,
Chief Justice.

Supreme Court of the District of Columbia.

Friday, April 22d, 1921.

Session resumed pursuant to adjournment, Mr. Chief Justice McCoy presiding.

* * * * * * *

Upon consideration of the motion of John W. Weeks, Secretary of War, respondent, filed herein April 20, 1921, by his
43 Attorney, for an order permitting him to file herein the amended answer accompanying said motion, it is ordered that the same be, and hereby is, denied.

Motion to Dismiss.

Filed April 23, 1921.

* * * * * * *

Now comes John W. Weeks appearing herein specially for the purpose of making this motion and not appearing herein otherwise and moves this court, upon his affidavit verified the 16th day of April, 1921, which affidavit is filed with a motion herein that was heard before, and determined by this court on the 22nd day of April, and upon all the papers and proceedings herein, for an order dismissing this action by reason of petitioner's failure to apply for or to cause the service of any process or order upon the substituted defendant to the end that he may be brought within the power and authority of the court for the purposes set forth in the petition herein and by reason of petitioner's failure to serve notice upon said substituted defendant with like purpose, and by reason of the court's having failed to acquire jurisdiction over the person of said substituted defendant; and for such other relief predicated upon the defects aforesaid as may be just.

FREDERICK M. BROWN,
Attorney for John W. Weeks,
Appearing Herein Specially.

Notice.

* * * * * * *

Messrs. Ansell & Bailey,
Attorneys for Petitioner:

Take notice that the aforegoing motion will be for hearing on the 29th day of April, 1921, at 10 a. m. before his honor, Chief Justice McCoy.

Washington, April 23, 1921.

FREDERICK M. BROWN,
Attorney for John W. Weeks,
Appearing Herein Specially.

44 *Proposed Rule to Show Cause.*

* * * * * * *

On reading and filing the annexed affidavit of Frederick M. Brown, verified the 23rd day of April, 1921, it is

Ordered, that petitioner show cause before me in open court on the 29th day of April, 1921, why the substituted defendant should not have leave to file such answer herein as is referred to in said affidavit or such other answer or amended answer as the interests of justice require. And it is

Further ordered, that neither the procuring of this order nor the argument and submission of the question aforesaid shall be deemed to constitute a general appearance of the substituted defendant or a waiver of the special appearance under which said defendant has noticed for hearing and intends to submit for determination a motion to dismiss the petition for want of jurisdiction of the person of the party defendant; provided nevertheless that nothing in this order contained shall be deemed to affect petitioner's right to cause the continued pendency of this application for leave to file a new answer, after a decision denying said motion to dismiss, or the filing of a new answer if such leave be granted, to be held and treated by the court as a general appearance herein, in case petitioner has such right under the law and according to the principles of justice. And it is

Further ordered, That service of a copy of this order upon the attorneys for the petitioner if made on or before the — day of April, 1921, shall be sufficient.

____ ____,
Chief Justice Supreme Court.

*

Affidavit of Frederick M. Brown.

Filed April 25, 1921.

* * * * * * *

Frederick M. Brown being duly sworn, deposes and says as follows:

1. By direction of John W. Weeks, the substituted defendant herein, I have to-day filed in the office of the clerk of this court a motion to dismiss the petition herein by reason of failure to obtain judisdiction of the person of the substituted party defendant, appearing specially for the purpose of said motion; and I have caused notice of hearing of said motion for April 29, 1921, to be served on petitioner's attorneys.

45 2. Subsequent to the filing of said motion, I have been directed by the substituted defendant herein that, if said motion to dismiss shall be denied on the ground that in the view taken by the court it already has jurisdiction of the person of the substituted party defendant, a motion or application shall be made for an order granting leave to file the answer a copy whereof was annexed to the motion made and decided herein April 22, 1921, except that a first page, a copy whereof is hereto annexed, is to be substituted for the first page of the above-mentioned answer. And for the purpose of making said last-mentioned motion or application, I have been authorized to enter, immediately after the denying of the motion to dismiss on the ground aforesaid, if said motion shall in fact be denied, such appearance as shall be necessary to enable the motion or application aforesaid for leave to file a new answer or an amended answer to be heard and determined on the merits; including a general appearance on behalf of the substituted party defendant in case the court refuses to hear and determine said motion otherwise.

3. The new answer which it is desired to file has been read over in my presence by Newton D. Baker, the original defendant herein, and he expressed to me his approval thereof in substance and form and as to the correctness and accuracy of the allegations of fact contained in it.

4. I desire to obtain an order granting leave to file a new answer in accordance with the authority and directions aforesaid. Great confusion and embarrassment have, however, resulted to the War Department and to the Army owing to the pendency of this action. By reason of this action, all promotions to commissioned offices in the Army in the grade of colonel and in grades inferior thereto are being delayed, hampered, and limited, if not entirely prevented. In order to diminish as much as possible the duration of the pendency of this litigation, I desire that argument upon both the questions aforesaid (in so far as further argument is asked for or permitted) shall be had at the same time, to wit, on April 29, 1921, the next motion day.

5. In order to make it clear that the substituted defendant insists upon his special appearance until after his motion to dismiss shall be denied (if, indeed, it shall be denied), I feel that an order to show cause of the nature herewith submitted is necessary.

FREDERICK M. BROWN.

Sworn to before me this the 23d day of April, 1921.

[SEAL.] N. CURTIS LAMMOND,
Notary Public.

46 In the Supreme Court of the District of Columbia.

At Law.

No. 64936.

THE UNITED STATES OF AMERICA ex Relatione WILLIAM F. CREARY, Petitioner,

v.

JOHN W. WEEKS, Secretary of War, Defendant.

Answer of Defendant, John W. Weeks, Secretary of War, to Petition for Mandamus and to Rule to Show Cause.

John W. Weeks, Secretary of War, now and at all times saving and reserving unto himself all exceptions to the imperfections, uncertainties, and defects in the petition for writ of mandamus filed herein, and reserving unto himself the benefit of the lack of jurisdiction of the court, appearing on the face of said petition, to grant the relief prayed for, and the lack of jurisdiction of the court of and over the person of the above-named party defendant herein and also the lack of jurisdiction of the court to direct him, as Secretary of War, to perform the act in question, and relying on the same for all purposes and also in like manner as if demurrer had been specifically interposed, for answer to said petition, or so much thereof as is material, and to said rule to show cause, says on information and belief as follows:

1. Defendant admits that the allegations contained in the first paragraph of the petition were true at the time of the filing thereof.

2. As to the matters alleged in the second paragraph of the petition, defendant admits the making of findings of moral, professional, and physical fitness upon which petitioner was appointed and commissioned first lieutenant, captain, major, and lieutenant colonel of Infantry, respectively; but defendant denies the materiality of the allegation that such findings or any of them were duly or correctly made and denies any knowledge or information as to the truth and fact in that regard. Defendant alleges that the present standard of professional fitness to qualify an officer to become or to

1.

Fiat.

Refused.

WALTER I. McCOY,
Chief Justice.

47 *Affidavit in Opposition to Motion Filed April 23, 1921, to Dismiss Above-entitled Cause.*

Filed April 29, 1921.

* * * * * * *

DISTRICT OF COLUMBIA, *ss:*

Personally appeared before me, a notary public in and for the District of Columbia, Edward S. Bailey, who, being first duly sworn, deposes and says that he is one of the counsel of record for the petitioner in the above-entitled cause. Affiant says:

(*a*) That the record shows that on January 11, 1921, the United States attorney entered his appearance for the then defendant, Newton D. Baker, Secretary of War, and that at the hearing on the demurrer to the answer of the then said defendant, L. H. Vandoren, Esq., an assistant United States attorney, representing the said United States Attorney Frederick M. Brown, colonel, judge advocate, United States Army, and W. A. Graham, lieutenant colonel, judge advocate, United States Army, appeared and argued the cause on behalf of the said Newton D. Baker.

(*b*) On, to wit, the 10th day of March, 1921, affiant presented an order to substitute respondent, John W. Weeks, Secretary of War, in lieu of Newton D. Baker, whose term of office had expired as such Secretary, as party defendant, to the said L. H. Vandoren, Esq., the assistant United States attorney having charge of the case in the office of the United States attorney, who noted upon said order of substitution his consent thereto; and that thereupon affiant in open court presented the said order to Mr. Chief Justice McCoy, who signed the same on the said 10th day of March, 1921, substituting the said John W. Weeks, the Secretary of War, as party defendant in lieu of the said Newton D. Baker.

(*c*) On the 12th day of March, 1921, the demurrer to the answer filed by the said Baker was sustained by the court.

(*d*) On the 14th day of March, 1921, affiant presented to Mr. Chief Justice McCoy, in open court, an order asking the court to issue the writ of mandamus in said cause, and the said Frederick M. Brown, colonel, judge advocate, appeared and, purporting to represent the respondent, opposed generally the issuance of said writ of mandamus.

(*e*) Thereafter, to wit, before the 18th day of March, 1921, the said Frederick M. Brown, colonel, judge advocate, purporting to represent

the respondent John W. Weeks, generally filed with the court a printed brief upon the questions involved in this cause; on the title-page of said brief appear the names of John E. Laskey, United States attorney; Frederick M. Brown, colonel, judge advocate, United States Army; Lucien H. Vandoren, assistant United States attorney;
48 W. A. Graham, lieutenant colonel, judge advocate, United States Army; and Archibald King, major, judge advocate, United States Army, as counsel.

(*f*) On the 18th day of March, 1921, the said Frederick M. Brown, purporting to represent as counsel the said respondent, John W. Weeks, presented a motion to the court asking for a rule to show cause to the court, and secured from the court a rule directing the petitioner herein to show cause why the memorandum decision of the court made in said cause on March 12, 1921, should not be revoked and annulled, and why reconsideration of all the issues in said cause should not be had, and why petitioner's demurrer to the answer should not be overruled, and why the petition should not be dismissed; copies of said motion and rule to show cause are hereto attached and made a part hereof.

(*g*) About the 1st day of April, 1921, the said Frederick M. Brown, purporting to represent generally the respondent, John W. Weeks, Secretary of War, as counsel, presented a motion to Mr. Chief Justice McCoy, a copy of which is hereto attached, which said motion was argued by the said Frederick M. Brown on behalf of the said John W. Weeks before Mr. Chief Justice McCoy, and the said L. H. Vandoren, W. A. Graham, and Archibald King were present, with the said Frederick M. Brown, at the argument thereof; and on the 12th day of April, 1921, the said Frederick M. Brown filed a memorandum of authorities with Mr. Chief Justice McCoy in support of said motion, which said memorandum applied also to a similar motion in the French case.

Affiant further says that notwithstanding the said order substituting the said John W. Weeks as defendant herein and the said general appearance by the said Frederick M. Brown, colonel, judge advocate, on behalf of the respondent, John W. Weeks, and the initiating by him of the motions or proceedings as aforesaid as counsel for and on behalf of the said John W. Weeks, and the occupying of the time and attention of the court in the presentation and argument of the said motions and proceedings, purporting as aforesaid to represent as counsel generally the said respondent, John W. Weeks, Secretary of War, the said Frederick M. Brown nevertheless on April 20, 1921, undertook to enter a special appearance for the respondent and to move the court for leave to file an answer for and on behalf of the said John W. Weeks, which said motion was denied. Nothwithstanding all of the foregoing, the said Frederick M. Brown, on the 23d day of April, 1921, purporting to appear specially for the said defendant, the Secretary of War, signed and filed in this court an instrument in writing moving the court to pass an order
49 "dismissing this action by reason of petitioner's failure to apply for or cause the service of any process or order upon the

substituted defendant," and claiming that the said John W. Weeks, Secretary of War, is not a party to this cause.

Affiant further says that the record of the court and the papers filed in this cause show that on April 25, 1921, said Frederick M. Brown presented an oral motion to Mr. Chief Justice McCoy asking the court to issue a rule directing that petitioner show cause why the substituted defendant should not have the leave to file such answer herein as referred to in the affidavit made by the said Frederick M. Brown attached to the proposed rule to show cause, copies of which are hereto attached and made a part hereof. The record shows that this oral motion was denied.

EDWARD S. BAILEY.

Subscribed and sworn to before me this 28th day of April, 1921.

[SEAL.] T. C. MEIDINGER,
Notary Public.

In the Supreme Court of the District of Columbia.

At Law.

No. 64936.

THE UNITED STATES OF AMERICA, ex Relatione WILLIAM F. CREARY, Petitioner,

v.

JOHN W. WEEKS, Secretary of War, Respondent.

On motion of Frederick M. Brown, of counsel for respondent, it is

Ordered, That the petitioner herein show cause before this court on the 21st day of March, 1921, at ten o'clock in the forenoon of that day, why the memorandum decision made herein March 12, 1921, should not be revoked and annulled and why reconsideration of all the issues herein should not be had and why petitioner's demurrer to the answer herein should not be overruled and why the petition herein should not be dismissed. And it is

Further ordered, That service of a copy of this rule, if made on petitioner's attorneys on or before the 19th day of March, 1921, shall be sufficient.

WALTER I. McCOY,
Chief Justice Supreme Court.

Washington, March 18, 1921.

50 In the Supreme Court of the District of Columbia.

At Law.

No. 64936.

UNITED STATES OF AMERICA, ex Rel. WILLIAM F. CREARY, Petitioner,

v.

JOHN W. WEEKS, Secretary of War, Respondent.

The demurrer to the answer herein having been argued and submitted and due consideration having been had, it is ordered that the said demurrer be, and the same hereby is, sustained with leave to respondent, within ten days after date hereof, to amend said answer or to file an amended answer herein.

——— ———,

Chief Justice Supreme Court.

Washington, March, 1921.

In the Supreme Court of the District of Columbia.

At Law.

No. 64936.

UNITED STATES OF AMERICA, ex Relatione WM. F. CREARY, Petitioner,

v.

JOHN W. WEEKS, Secretary of War, Respondent.

On reading and filing the annexed affidavit of Frederick M. Brown, verified the 23d day of April, 1921, it is

Ordered, That petitioner shows cause before me in open court on the 29th day of April, 1921, why the substituted defendant should not have leave to file such answer herein as is referred to in said affidavit, or such other answer or amended answer as the interests of justice require. And it is further ordered that neither the procuring of this order nor the argument and submission of the questions aforesaid shall be deemed to constitute a general appearance of the substituted defendant or a waiver of the special appearance under which said defendant has notice for hearing and intends to submit for determination a motion to dismiss the petition for want of jurisdiction of the person of the party defendant; provided, nevertheless, that nothing in this order contained shall be deemed to affect the petitioner's right to cause the continued pendency of this application for leave to file a new answer after a decision denying said motion to dismiss, or the filing of a new answer if such leave be

granted, to be held and treated by the court as a general appearance and hearing, in case the petitioner has such right under the law and according to the principles of justice. And it is further or-
51 dered that service of a copy of this order upon the attorneys for the petitioner, if made on or before the — day of April, 1921, shall be sufficient.

——— ———,
Chief Justice Supreme Court.

In the Supreme Court of the District of Columbia.

At Law.

No. 64936.

UNITED STATES OF AMERICA, ex Relatione WM. F. CREARY, Petitioner,

v.

JOHN W. WEEKS, Secretary of War, Defendant.

Frederick M. Brown, being duly sworn, deposes and says, as follows:

1. By direction of John W. Weeks, the substituted defendant herein, I have to-day filed in the office of the clerk of this court a motion to dismiss the petition herein by reason of failure to obtain jurisdiction of the person of the substituted party defendant appearing specially for the purpose of said motion; and I have caused notice of hearing of said motion for April 29, 1921, to be served on petitioner's attorneys.

2. Subsequent to the filing of said motion, I have been directed by the substituted defendant herein that if said motion to dismiss shall be denied on the ground that, in the view taken by the court, it already has jurisdiction of the person of the substituted party defendant, a motion or application shall be made for an order granting leave to file the answer, a copy whereof was annexed to the motion made and decided herein April 22, 1921, except that a first page, a copy whereof is hereto annexed, is to be substituted for the first page of the above-mentioned answer. And for the purpose of making said last-mentioned motion or application, I have been authorized to enter, immediately after the denying of the motion to dismiss on the ground aforesaid, if said motion shall in fact be denied, such appearance as shall be necessary to enable the motion of application aforesaid for leave to file a new answer or an amended answer to be heard and determined on the merits; including a general appearance on behalf of the substituted party defendant in case the court refuses to hear and determine said motion otherwise.

3. The new answer which is desired to be filed has been read over in my presence by Newton D. Baker, the original defendant herein,

and he expressed to me his approval thereof in substance and
52 form, and as to the correctness and accuracy of the allegations of fact contained in it.

4. I desire to obtain an order granting leave to file a new answer in accordance with the authority and directions aforesaid. Great confusion and embarrassment have, however, resulted to the War Department and to the Army owing to the pendency of this action. By reason of this action, all promotions of commissioned officers in the Army in the grade of colonel and in grades inferior thereto are being delayed, hampered, and limited, if not entirely prevented. In order to diminish as much as possible the duration of the pendency of this litigation, I desire that argument upon both the questions aforesaid (in so far as farther argument is asked for or permitted) shall be at the same time, to wit, on April 29, 1921, the next motion day.

5. In order to make it clear that the substituted defendant insists upon his special appearance until after his motion to dismiss shall be denied (if indeed, it shall be denied), I feel that an order to show cause of the nature hereof submitted is necessary.

FREDERICK M. BROWN.

Sworn to before me this, the 23d day of April, 1921.

M. CURTIS LAMMOND,
Notary Public.

Supreme Court of the District of Columbia.

Friday, April 29, 1921.

Session resumed pursuant to adjournment, Mr. Chief Justice McCoy, presiding.

* * * * * * *

Upon consideration of the motion of respondent filed herein April 23, 1921, to dismiss this action, it is ordered that said motion be, and it is hereby, overruled.

This cause coming on to be heard upon the petition, the answer and demurrer thereto, and after argument of counsel, and the cause being submitted to and considered by the court, and the court having sustained the demurrer on the 12th day of March, A. D. 1921, it is by the court this 29th day of April, 1921,

Ordered, That the writ of mandamus forthwith issue against John W. Weeks, Secretary of War of the United States, as prayed for in the petition herein, commanding him to vacate and set aside the order dated the 17th day of November, 1920, purporting to discharge the relator, William F. Creary, from the Army of the United States, and restore the said relator, William F. Creary, to the
53 office and status of colonel of Infantry in the Army of the United States, as of the 17th day of November, 1920, the

date of the said order purporting to discharge him from said office and from the Army of the United States, and to the rights incident and belonging to said office and status of which he was deprived by said order.

From the foregoing order the respondent by his attorney in open court notes an appeal to the Court of Appeals of the District of Columbia.

Motion to Correct Record and to Vacate Final Judgment.

Filed May 3, 1921.

* * * * * * *

Now comes John W. Weeks, making such appearance herein as this motion justly implies, and upon the affidavit of Frederick M. Brown, verified May 3, 1921, hereto annexed and marked "Exhibit A," and upon the other papers hereto annexed, which papers are mentioned and described in paragraphs 2 and 6 of said affidavit and marked "Exhibits B," "C," "D," "E," "F," "G," and "H," respectively, and upon all the papers and proceedings herein, moves this court for an order or for orders granting defendant relief as follows:

1. That the records of this court be amended, supplemented, and corrected so as to show the true nature of its proceedings in that on the 22nd day of April, 1921, this court found, concluded, and decided that the defendant had not submitted to the jurisdiction of this court, and in that on the 29th day of April, 1921, and before the signing of the final judgment herein defendant applied for leave to file a motion granting him permission to interpose an answer, which said motion and answer are set forth and described in Exhibit B, hereto annexed, and defendant offered to appear generally and to submit to the jurisdiction of the court in order to secure consideration of said motion, and defendant applied for the immediate consideration of said motion.

2. That the final judgment or order herein be vacated and that leave be granted to defendant to interpose the answer mentioned and described in Exhibit B, hereto annexed.

3. That the final judgment or order herein be vacated, and that this action be dismissed unless within a time to be fixed by the court petitioner shall cause due process, order, or rule to be served upon the substituted defendant so as to subject him to the jurisdiction of the court.

Washington, May 3, 1921.

JOHN E. LASKEY,
United States Attorney.
FREDERICK M. BROWN,
Colonel, Judge Advocate, U. S. A.

54 EXHIBIT A.

DISTRICT OF COLUMBIA, *ss:*

Frederick M. Brown, being duly sworn, deposes and says as follows:

1. On the 23rd day of April, 1921, I filed herein as attorney for the defendant, under a special appearance, a motion to dismiss the action for want of jurisdiction of the person of the party defendant, which said motion was argued and denied April 29, 1921.

2. In open court on the 29th of April, 1921, before submitting the motion aforesaid, I presented to the court the motion hereto annexed, marked "Exhibit B"; the two affidavits hereto annexed, marked "Exhibits C" and "D," respectively; a copy of the letter of authority hereto annexed, marked "Exhibit E", a copy of the proposed first page of a new answer herein hereto annexed, marked "Exhibit F"; and the proposed notice of hearing hereto annexed, marked "Exhibit G." And at the same time I made oral application to the court to be permitted to file the same *tunc pro nunc* as of the time of the court's decision upon the motion to dismiss. The permission thus sought was not granted, the court stating that the application would be considered after the argument and decision of the pending motion.

3. On said 29th day of April, 1921, in the court room and prior to the opening of court, I presented to Col. Edward S. Bailey a copy of the papers mentioned in paragraph 2 hereof, stating that they were papers supporting a motion herein intended to be effective the instant that a ruling upon the motion to dismiss should be made, and I asked Col. Bailey to accept the papers upon the understanding that my serving them was not to prejudice my contention, upon the pending motion to dismiss, that my appearance for the defendant was special and not general. Col. Bailey refused to accept the papers upon this understanding and they were not left with him.

4. After the conclusion of the argument upon the motion to dismiss and immediately upon the court's oral announcement of its decision to deny the motion to dismiss, I orally renewed my application for leave to file the papers referred to in paragraph 2 hereof, to wit, Exhibits B, C, D, E, F, and G, and I asked the court to grant an immediate hearing of the motion expressed in Exhibit B, stating that defendant would appear generally for that purpose if necessary. No distinct ruling upon said oral application was made by the court, except that the court shortly afterward signed a paper stated by the court to be the final judgment or order asked for and presented by the petitioner.

55 5. Before the final judgment or order was signed as aforesaid, I requested the clerk to make a minute upon the records of this court showing the making of the applications referred to in paragraphs 2 and 4 hereof and the rulings thereon. I am informed

and believe that such minute has not been made. I desire, and I conceive the defendant to be entitled to, an order requiring that the facts stated in paragraphs 2 and 4 hereof to appear upon the records of this court. In my opinion said facts are material with reference to further proceedings herein in this court or in the appellate court or courts.

6. I have endeavored to cure the imperfections aforesaid in the records of this court by ex parte order. To that end, I drew on the 29th of April, 1921, the order hereto annexed and marked "Exhibit H." My endeavor to present said order to his honor, Chief Justice McCoy, on said day or to leave it with his secretary failed. The following day I was not accorded an interview with Chief Justice McCoy, but I left said order with his secretary. On Monday, May 2, 1921, Chief Justice McCoy informed me that he would not sign the order ex parte, but that I must notice a motion for said order or for a similar order in due course under the rules and practice.

7. In the course of the argument aforesaid on the 29th of April, 1921, Col. Edward S. Bailey read from a certain affidavit herein, said to have been verified by him on the 28th day of April, 1921. In certain respects, the assertions made therein are inaccurate, the truth in respect thereto being as follows:

(*a*) I attended in court on the 14th day of March, 1921, in response to a request from petitioner's attorneys which had been communicated to me by Major King, J. A., only a few minutes previously. Prior to leaving for court it had been impossible for me to speak to the Acting Judge Advocate General or to the Secretary of War. In court I explained this fact, and I disavowed authority to speak for anyone or to represent the defendant generally or otherwise.

(*b*) In all acts done by me thereafter and until April 21, 1921, I acted and purported to act as counsel on behalf of the United States attorney, who purported to be acting as attorney for the defendant. All of my acts were performed under his instructions and received his approval. From the time of my learning of the order of substitution, which was entered herein March 10, 1921, until April 12, 1921, or thereabouts, I suppose that the United States attorney had full authority to represent the substituted defendant for all purposes herein. On or about April 12, 1921, I learned that his only authority to do so was that which he deemed to be implied in law without actual retainer or instructions from the defendant.

56 (*c*) In respect of my acts as counsel under instructions of the United States attorney, I did not purport to represent, or to make appearance for the defendant generally. While not conceding that those acts in legal intendment and effect amount to a general appearance in any event, I assert that they cannot have that effect in this case because defendant did not authorize a general appearance for him to be made at that time. Otherwise I have only acted or purported to act for the substituted defendant specially in con-

formity with his instructions to me, which instructions are set forth in the affidavit of John W. Weeks, verified April 16, 1921, and in my affidavit, verified April 23, 1921, both of which are on file herein.

8. That up to and including April 22, 1921, the substituted defendant had not appeared generally herein was expressed adjudicated by the court; for the court on said April 22, 1921, denied defendant's motion for leave to file the answer annexed to said motion on the express ground, stated in open court, that said motion could not be granted or considered because defendant had not submitted to the jurisdiction of the court and was only appearing specially. I am informed and believe that the records of this court are defective in failing to disclose the fact that an adjudication as to the nature of defendant's appearance was made April 22, 1921.

9. The decision made by the court April 29, 1921, to deny the motion to dismiss must, it would seem, have been based upon the theory that at that time the substituted defendant had submitted to the jurisdiction of this court. And yet there had been no act by defendant or any one else in the interval between April 22 and April 29, 1921, which, under any possible legal argument, could amount to a general appearance or to a submission to the jurisdiction of the court.

FREDERICK M. BROWN.

Sworn to before me this the third day of May, 1921
[SEAL.] N. CURTIS LAMMOND.
Notary Public.

EXHIBIT B.

* * * * * * *

The motion of John W. Weeks, named herein as defendant, for an order dismissing the petition by reason of want of jurisdiction of the person of the party defendant having been denied and the court having ruled that it has jurisdiction of the person of the party defendant, now comes said John W. Weeks and moves this court, upon his affidavit herein, verified the 29th day of April, 1921, and hereto annexed, and upon his affidavit herein verified the 16th day of April, 1921, and annexed to and included in the papers upon
57 which the motion herein was made and determined April 22, 1921; and upon the affidavit of Edward A. Kreger, verified the 29th day of April, 1921; and upon the affidavit of Frederick M. Brown, verified April 23, 1921, and filed April 23, 1921, in the office of the clerk of this court; and upon all the papers and proceedings herein, for an order permitting defendant to file herein an answer, a copy whereof was included in the papers upon which the motion aforesaid was made and determined April 22, 1921, except that the defendant desires leave to substitute the page, a copy whereof is hereto annexed, instead of the first page of said proposed answer on which the motion was made April 22, 1921; and for the purpose of the submission of the present motion the defendant, not limiting

his appearance to the special appearance heretofore entered, makes such general or other appearance as is properly implied in said submission or as the court may rule to be necessary to that end.

JOHN E. LASKEY,
United States Attorney.
FREDERICK M. BROWN,
Colonel, Judge Advocate, U. S. A.

EXHIBIT C.

* * * * * * *

John W. Weeks, being duly sworn, deposes and says that he has conferred authority upon Col. E. A. Kreger, U. S. A., Acting Judge Advocate General of the Army, to cause a general appearance to be entered herein on his behalf in accordance with and subject to the terms and conditions specified in a certain letter of authority dated the 29th day of April, 1921, a copy whereof is hereto annexed and made a part of this affidavit. Deponent further says that, except for the authority conferred upon Colonel Frederick M. Brown, as set forth in deponent's affidavit verified the 16th of April, 1921, and in the affidavit of Frederick M. Brown verified the 23rd of April, 1921, and as herein set forth, deponent has at no time authorized any one to appear for him or to represent him in this action.

JOHN W. WEEKS.

Sworn to before me this the 29th day of April, 1921.
[SEAL.] N. CURTIS LAMMOND,
Notary Public.

EXHIBIT D.

* * * * * * *

Edward A. Kreger, being duly sworn, deposes and says that he is the Acting Judge Advocate General of the United States
58 Army and that pursuant to the power and authority conferred April 29, 1921, upon him by the Secretary of War, he has empowered and requested John E. Laskey, U. S. attorney, to make such appearance (other than the appearance already made herein by Frederick M. Brown) as is described in, and as may prove necessary to enable consideration of, the foregoing motion to be had on the merits, and deponent has directed said Frederick M. Brown to support said motion as special attorney for the defendant and also (to the extent that is acceptable to the U. S. attorney) as counsel for the defendant upon any broad appearance made by the U. S. attorney.

EDWARD A. KREGER.

Sworn to before me this the 29th day of April, 1921.
[SEAL.] N. CURTIS LAMMOND,
Notary Public.

EXHIBIT E.

April 29, 1921.

Colonel E. A. Kreger,
Acting Judge Advocate General, U. S. A.:

DEAR SIR:

In the mandamus actions instituted by Colonel William F. Creary and by Colonel John W. French in the Supreme Court of the District of Columbia (actions at law, numbers 64936 and 65058) you are hereby authorized to enter, or to cause to be entered by the U. S. attorney or by anyone else selected by you, my general appearance immediately upon the court's determining that it has acquired jurisdiction over me therein or at such other time as you may deem just and proper; and if the court shall decide in favor of its jurisdiction over me, you are hereby authorized to waive any further objection to the jurisdiction of the court or to reserve objection to such jurisdiction, notwithstanding your entering a general appearance on my behalf, whichever of those courses shall seem to you to be just and proper.

Yours truly,

JOHN W. WEEKS,
Secretary of War.

EXHIBIT F.

* * * * * * *

Answer of Defendant, John W. Weeks, Secretary of War, to Petition for Mandamus and to Rule to Show Cause.

John W. Weeks, Secretary of War, now and at all times saving and reserving unto himself all exceptions to the imperfec-
59 tions, uncertainties, and defects in the petition for writ of mandamus filed herein, and reserving unto himself the benefit of the lack of jurisdiction of the court appearing on the face of said petition to grant the relief prayed for, and the lack of jurisdiction of the court of and over the person of the above-named party defendant herein and also the lack of jurisdiction of the court to direct him, as Secretary of War, to perform the act in question, and relying on the same for all purposes and also in like manner as if demurrer had been specifically interposed, for answer to said petition, or so much thereof as is material, and to said rule to show cause, says on information and belief as follows:

1. Defendant admits that the allegations contained in the first paragraph of the petition were true at the time of the filing thereof.

2. As to the matters alleged in the second paragraph of the petition, defendant admits the making of findings of moral, professional, and physical fitness upon which petitioner was appointed and commissioned first lieutenant, captain, major, and lieutenant colonel

of Infantry, respectively; but defendant denies the materiality of the allegation that such findings or any of them were duly or correctly made and denies any knowledge or information as to the truth and fact in that regard. Defendant alleges that the present standard of professional fitness to qualify an officer to become or to

(1)

EXHIBIT G.

* * * * * * *

Messrs. Ansell & Bailey,
Attorneys for Petitioner:

Please take notice that in case pending motion to dismiss for want of jurisdiction of the person of the party defendant is denied this motion will be filed and brought on for hearing for the first motion day thereafter or for the first opportunity for hearing granted by the court in case earlier opportunity may be so granted.

FREDERICK M. BROWN,
Colonel, Judge Advocate, U. S. A.
JOHN E. LASKEY,
United States Attorney.

EXHIBIT H.

* * * * * * *

The defendant having in open court on the 29th day of April, 1921, before submitting his motion to dismiss asked leave to
60 to file the annexed motion and motion papers as of the time of the decision of said motion to dismiss, and having renewed said request upon the announcing of the court's decision denying said motion to dismiss, and having asked thereupon for immediate consideration of the annexed motion, and the court having granted leave to file in the clerk's office said last-mentioned motion and motion papers and having denied said application for immediate consideration thereof, and having directed final judgment for the petitioner to be entered forthwith, now it is by the court this the 30th day of April, 1921,

Ordered, That said motion and motion papers hereto annexed be filed nunc pro tunc as of April 29, 1921, immediately prior to the entry of final judgment herein, and it is

Further ordered, That said motion be denied.

Chief Justice Supreme Court.

In the Supreme Court of the District of Columbia.

* * * * * * *

Take notice that the aforegoing motion, dated this day, will be for hearing on the 6th day of May, 1921, at 10 a. m., before his honor, Chief Justice McCoy.

JOHN E. LASKEY,
United States Attorney.
FREDERICK M. BROWN,
Colonel, Judge Advocate, U. S. A.

Washington, May 3, 1921.

Memorandum.

June 16, 1921.

Time for filing transcript of record extended to and including July 12, 1921.

Assignment of Errors.

Filed July 1, 1921.

* * * * * * *

John W. Weeks, named as the substituted defendant herein, hereby assigns error in the final order or judgment of the Supreme Court of the District of Columbia signed and entered on the 29th day of April, 1921, in the following particulars:

First. For that the court awarded and directed the issuing of a peremptory writ of mandamus commanding the said defendant to vacate a certain War Department order made November 17, 1920, by, or by the authority of, his predecessor in the office of Secretary of War, which order discharged the relator from the Army,
61 and commanding the said defendant to induct the relator into the office of colonel of Infantry in the Army.

Second. For that the court refused to dismiss the petition for failure to state a good cause of action.

Third. For that the court held and decided that the answer filed by Newton D. Baker, the original defendant herein, to the petition was insufficient to constitute a defense to the petition.

Fourth. For that the court sustained relator's demurrer to the answer of said Newton D. Baker and refused to permit proof to be made in respect of the issues of fact raised by the petition and by the said answer.

Fifth. For that the court held and decided that the action taken in any case by the final classification board under section 24*b* of the

act of June 4, 1920 (41 Stat., 759, 773), commonly called the Army reorganization act, is ineffective unless actually reviewed through the personal and individual consideration of the President; and for that the court refused to hold that the action of said board is effective and binding unless the President see fit to intervene by way of ordering a revision of its action.

Sixth. For that the court held and decided that an Army officer who has been classified in class B under the terms of the section aforesaid is entitled to notice and hearing before the board to determine the cause of classification; and for that it held that such an officer is entitled to a hearing upon the question of the cause of his classification; and for that the court refused to hold that an officer who has had a hearing before a court of inquiry preliminary to his final classification has had such a hearing upon the question of the cause of classification as the law requires.

Seventh. For that the court, in awarding mandamus in this case, violated the rule that mandamus is not the proper remedy to cure the effect of an improper executive act not enjoined upon the defendant official by law or to cure the effect of one involving judgment or discretion, the acts of the Secretary of War in this case being not only not enjoined upon him by law, but also involving judgment and discretion.

Eighth. For that the court, in awarding mandamus in this case, violated the rule that mandamus is not the proper remedy if the relator has another adequate remedy; relator's only justiciable, ultimate right in this case (if any right exists) being a right to compensation and his only intermediate rights (if any such rights exist) being a right to have the final classification board submit his case to the President for personal attention and consideration by the President and a right to be granted a hearing by the board to determine cause of classification, the rights aforesaid being enforceable
62 by action in the Court of Claims and by mandamus against the members of said boards, respectively.

Ninth. For that the court, in awarding mandamus in this case, violated the rule that mandamus is not the proper remedy where no substantial injustice to relator is shown or where the alleged wrong suffered by the relator falls short of being clear and indisputable; the fact being in this case that the relator has, by his demurrer, admitted that he has not always rendered efficient service to the Army and has at times been guilty of neglect of duty, misconduct, or disqualifying habits and the relator's right to redress, if any there be, is of a very doubtful nature owing, among other things, to uncertainties and ambiguities in the statute involved, a statute not previously interpreted by the courts.

Tenth. For that the court refused to hold that it is entirely optional with the President whether or not he considers cases arising under section 24*b* aforesaid and that it is entirely optional with him

whether or not the fact of the pendency of such cases shall be brought to his notice.

Eleventh. For that the court refused to hold that any action necessary or appropriate to be taken in cases arising under said section 24*b* by the President or under presidential authority may properly and effectively be delegated by him to the Secretary of War and, in particular, that the court refused to hold that the President may properly and effectively delegate to the Secretary of War the duty of determining which of said cases merit the time and personal consideration of the President and which cases do not.

Twelfth. For that, after dismissing Newton D. Baker as a party defendant herein, and naming John W. Weeks as the substituted party defendant by order made and entered herein March 10, 1921, the court took any proceeding until after its process or some appropriate notice should have been served upon said John W. Weeks or until after he should have appeared generally herein; and in particular for that the court entered final judgment or order herein and awarded a peremptory writ of mandamus against said John W. Weeks without any such process, notice, or appearance.

Thirteenth. For that the court at no time had jurisdiction of the person of the said John W. Weeks; and for that the court has neglected and omitted to cause process or notice to be served on said John W. Weeks so as to acquire jurisdiction of his person; and for that the court has held and decided that it has acquired jurisdiction over John W. Weeks by general appearance; and for that the court refused to dismiss the action for want of jurisdiction upon motion to that end duly filed April 23, 1921, and submitted April 29, 1921, under a special appearance.

63 Fourteenth. For that the court by its writ of mandamus assumed to command the performance by the substituted defendant of two acts which are for him perfectly impossible, to wit, investing relator, who has ceased to be an Army officer, with the office of colonel, an act within the competency of the President and Senate alone, and creating for relator the office of colonel formerly held by him without nomination or confirmation, which office, irrespective of the validity or invalidity of the order discharging him from the Army, expired March 4, 1921, with the end of the session of the Senate of the United States, in virtue of article 2, section 2, clause 3, of the Constitution.

Fifteenth. For that the court has denied to the defendants, or any of them, an opportunity of showing by amended or supplemental answer, the facts which, since the filing January 25, 1921, of the answer of Newton D. Baker, having become material owing to the end of the session of the Senate, March 4, 1921.

Sixteenth. For that the court refused to consider on its merits the motion of John W. Weeks filed April 20, 1921, and submitted April 22, 1921, for leave to interpose an answer of his own, a copy of which intended answer was submitted with the motion, notwithstanding the

fact that said John W. Weeks formally offered to appear generally as a condition to the desired leave being granted and notwithstanding the fact that the court has subsequently ruled that his acts prior to April 22, 1921, constituted a general appearance.

Seventeenth. For that the court has denied to John W. Weeks the right to a due hearing, since due hearing can not be had without opportunity to plead.

Eighteenth. For that the court on the 25th day of April, 1921, refused to grant a rule to show cause of such nature that, if granted, an opportunity would have been afforded to said John W. Weeks on the 29th day of April, 1921, or, at all events, before final judgment, of submitting his motion for leave to interpose his own answer on any terms exacted by the court, but without waiving his right to a decision upon his contention that the court had not yet acquired jurisdiction over his person.

Nineteenth. For that the court entered final judgment herein immediately after overruling the motion to dismiss for want of jurisdiction and without affording opportunity to submit the motion of John W. Weeks for leave to interpose an answer to his own or to amend the answer of Newton D. Baker, notwithstanding urgent requests on behalf of said John W. Weeks to be afforded such opportunity and notwithstanding his offer to enter any appearance necessary to enable a motion to that end to be considered on its merits.

64 Twentieth. For that the court refused to direct that the minutes of the court should record the requests and offer which were made, as aforesaid, before final judgment.

Twenty-first. For that the court overruled the motion filed May 3, 1921, and submitted May 23, 1921, or any part thereof.

JOHN E. LASKEY,
Attorney of the United States in and
for the District of Columbia,
Attorney for Respondent.

Designation of Record.

Filed July 1, 1921.

* * * * * * *

In preparing the record on appeal in the above-entitled cause, the clerk will please include

1. All docket entries relating to this case.

2. All minute entries relating to this case; especially those (*a*) of March 10, 1921, appearing at page 293 of volume 70 of minutes; (*b*) of March 12, appearing at page 298 thereof; (*c*) of March 18, appearing at page 315 thereof; (*d*) of March 21, appearing at page

317 thereof (*e*) of April 22, appearing at page 360 thereof; (*f*) of April 29, appearing at page 371 thereof; (*g*) of May 27, appearing at page 397 thereof; and (*h*) of June 16, appearing at page 431 thereof.

3. Petition for writ of mandamus.

4. Rule of January 3, 1921, ordering Newton D. Baker to show cause.

5. Answer of Newton D. Baker to petition, with six exhibits annexed to said answer.

6. Relator's demurrer to answer of Newton D. Baker.

7. Order of substitution entered March 10, 1921.

8. Memorandum of decision of court sustaining demurrer, filed March 12, 1921.

9. Rule to show cause granted March 18, 1921.

10. Relator's answer to rule.

11. Opinion of court, filed March 26, 1921.

12. Motion for leave to amend answer or to file amended answer, which was argued April 1, 1921, and decided April 11, 1921.

13. Memorandum of the decision of the court, made and filed April 11, 1921, in respect of the motion argued April 1, 1921.

14. Motion filed April 20, 1921, with affidavit of John W. Weeks, verified April 16, 1921, and copy of proposed answer verified April 16, 1921, in support of said motion.

65 15. Memorandum of the decision of the court made April 22, 1921, upon said motion; which memorandum was filed May 23, 1921.

16. Proposed rule to show cause returnable April 29, 1921, which was presented ex parte April 23, 1921, and was refused April 25, 1921, and filed the same day; together with affidavit of Frederick M. Brown, verified April 23, 1921, in support of rule, with autograph memorandum of refusal by Chief Justice McCoy and with note stating that first page of proposed answer referred to in motion is the same as Exhibit F annexed to motion filed May 3, 1921, and submitted May 23, 1921.

17. Motion to dismiss filed April 23, 1921, and submitted April 29, 1921.

18. Affidavit of Edward S. Bailey read April 29, 1921, in opposition to motion to dismiss filed April 23, 1921.

19. Final order or judgment entered April 29, 1921.

20. Motion filed May 3, 1921, and submitted May 23, 1921; together with papers annexed thereto, to wit, Exhibits A, B, C, D, E, F, G, and H.

21. Memorandum of decision of court made May 27, 1921, upon motion filed May 3, 1921.

22. Assignment of errors.

23. This designation.

JOHN E. LASKEY,
Attorney of the United States in and for the District of Columbia,
Attorney for Respondent.

Service of copy of above upon us June 25, 1921.
ANSELL & BAILEY,
Attorneys for Petitioner.

Memorandum.

July 8, 1921.—Time for filing transcript of record extended to and including August 1, 1921.

66 Supreme Court of the District of Columbia.

No.	Parties.	Action.	
61936.	The United States of America, ex relatione William F. Creary, vs. John W. Weeks, Secretary of War.	Mandamus.	Plaintiff's attorney, Ansell & Bailey. Defendant's attorney, U. S. Atty.

Date judgment.	Proceedings.	
1921, Jany. 3.	Petition & appearance, order to file.	Filed.
" " "	Respondent ordered to show cause on Jany. 2, 1921, why writ should not issue (M. 70, p. 201).	
" " "	Rule to show cause & 1 copy issued.	
" " 11.	Appearance U. S. attorney for defdt. Order.	Filed.
" " 25.	Answer of respondent & exhibits (6).	"
" " 31.	Demurrer to answer of respondent.	"
" Mch. 10.	John W. Weeks, Secy. of War, substituted as respt. (M. 70, p. 293.)	
" " 12.	Demurrer to answer sustained (M. 70, p. 298)	
" " 12.	Opinion. Filed.	
" " 18.	Rule to show cause (M. 70, p. 315).	
" " 21.	Answer of relator to rule.	Filed.
" " "	Oral motion of respdt. to revoke and annul the memo. decision of Mar. 12, & reconsider all issues, to overrule petitioner's demurrer to respdt's. answer & dismiss petition, overruled without prejudice (M. 70, p. 317).	
" " 26.	Opinion of court.	Filed.
" Apr. 11.	Memo. of court.	"

Date judgment.			Proceedings.	
1921,	Apr.	20.	Appearance, special of Defdt. Weeks by Fredk. M. Brown. Mo. for leave to file answer, affidavit, proposed answer and affidavit.	"
"	"	22.	Mo. for leave to file amended answer denied (M. 70, p. 360).	
"	"	23.	" of Defdt. Weeks to dismiss cause & notice.	"
"	"	25.	Affidavit of atty. for defendant in support of motion for rule to show cause why new answer should not be filed. Copy of proposed rule & endorsement of Chief Justice showing denial of rule	"
"	"	29.	Affidavit in opposition to mo. filed April 23 to dismiss & exhibits (4).	
"	"	"	Motion to dismiss action overruled (M. 70, p. 371).	
67				
1921,	Apr.	29.	Ordered that writ of mandamus issue. Appeal noted by respondent (M. 70, p. 371).	Filed.
"	May	3.	Motion of defdt. to correct record, vacate judgment. Exhibits (8) & notice.	"
"	"	23.	Memo. of court.	"
"	"	27.	Motion to correct record & vacate judgment of April 29, 1921, overruled (M. 70, p. 397).	
"	June	16.	Time to file transcript extended to July 12 (M. 70, p. 431).	
"	July	1.	Assignment of error.	Filed.
"	"	"	Designation of record.	"
"	"	8.	Time to file transcript extended to August 1, 1921 (M. 70, p. 472).	

Supreme Court of the District of Columbia.

UNITED STATES OF AMERICA,
District of Columbia, ss:

I, Morgan H. Beach, clerk of the Supreme Court of the District of Columbia, hereby certify the foregoing pages numbered from 1 to 108, both inclusive, to be a true and correct transcript of the record, according to directions of counsel herein filed, copy of which is made part of this transcript, in cause No. 64936 at law, wherein The United States of America, ex relatione William F. Creary, is petitioner, and Newton D. Baker is respondent, as the same remains upon the files and of record in said court.

In testimony whereof, I hereunto subscribe my name and affix the seal of said court, at the city of Washington, in said District, this 21st day of July, 1921.

[SEAL.]
E. W. MORGAN H. BEACH,
Clerk.

(Indorsement on cover:) District of Columbia Supreme Court. No. 3693. John W. Weeks, Secretary of War, appellant, vs. The United States of America, ex relatione William F. Creary. Court of Appeals, District of Columbia. Filed July 26, 1921. Henry W. Hodges, clerk.

68

Friday, October 7th, A. D. 1921.

* * * * * * *

No. 3693

JOHN W. WEEKS, Secretary of War, Appellant,

vs.

THE UNITED STATES OF AMERICA ex Relatione WILLIAM F. CREARY

and

No. 3694

JOHN W. WEEKS, Secretary of War, Appellant,

vs.

THE UNITED STATES OF AMERICA ex Relatione JOHN W. FRENCH.

The argument in the above entitled causes was commenced by Mr. L. H. Vandoren, attorney for the appellant.

Monday, October 10th, A. D. 1921.

* * * * * * *

No. 3693.

JOHN W. WEEKS, Secretary of War, Appellant,

vs.

THE UNITED STATES OF AMERICA ex Relatione WILLIAM F. CREARY

and

No. 3694.

JOHN W. WEEKS, Secretary of War, Appellant,

vs.

THE UNITED STATES OF AMERICA ex Relatione JOHN W. FRENCH.

The argument in the above entitled causes was continued by Messrs. Samuel T. Ansell and Chas. P. Caldwell, attorneys for the appellees, and was concluded by Mr. Frederick M. Brown, attorney for the appellant.

69 In the Court of Appeals of the District of Columbia.

No. 3693.

JOHN W. WEEKS, Secretary of War, Appellant,

vs.

THE UNITED STATES OF AMERICA, ex Relatione WILLIAM F. CREARY, Appellee.

Opinion.

Mr. Justice VAN ORSDEL delivered the opinion of the Court.

Relator Creary filed a petition in the Supreme Court of the District of Columbia for a writ of mandamus to compel respondent, Newton D. Baker, Secretary of War, to vacate an order discharging the relator from the army of the United States and to restore him to the rank of colonel. A rule to show cause was issued. Respondent answered the petition, and the relator demurred to the answer. Later, present respondent, John W. Weeks, Secretary of War, was substituted for Baker. From a judgment for relator, the case comes here on appeal.

The controversy involves the construction of section 24*b* of the National Defense Act of June 4, 1920, 41 Stats. L., 759, 773. The material portions of the section read as follows: Immediately upon the passage of this Act, and in September of 1921 and every year thereafter, the President shall convene a board of not less than five general officers, which shall arrange all officers in two classes, namely: Class A, consisting of officers who should be retained in the service, and Class B, of officers who should not be retained in the service. Until otherwise finally classified, all officers shall be regarded as belonging to Class A, and shall be promoted according to the provisions of this Act to fill any vacancies which may
70 occur prior to such final classification. No officer shall be finally classified in Class B until he shall have been given an opportunity to appear before a court of inquiry. In such court of inquiry he shall be furnished with a full copy of the official records upon which the proposed classification is based and shall be given an opportunity to present testimony in his own behalf. The record of such court of inquiry shall be forwarded to the final classification board for reconsideration of the case, and after such consideration the finding of said classification board shall be final and not subject to further revision except upon the order of the President. Whenever an officer is placed in Class B, a board of not less than three officers shall be convened to determine whether such classification is due to his neglect, misconduct or avoidable habits. If the finding is affirmative, he shall be discharged from the army; if negative, he shall be placed on the unlimited retired list with pay at the rate of 2 1/2 per centum of his active pay multiplied

by the number of complete years of commissioned service, or service which under the provisions of this Act is counted as its equivalent, unless his total commissioned service or equivalent service shall be less than ten years, in which case he shall be honorably discharged with one year's service."

The relator was placed by the classification board in class B, and at his request a court of inquiry was convened, before which he appeared with counsel. Complaint is made that he was not furnished with a full copy of his record in the War Department, but was furnished only with copies of the unfavorable parts of his record. He was, however, permitted to examine all original records in the presence of the court while in session. No objection was interposed by him or his counsel to the proceedings before the court of inquiry; hence, it is too late to raise objection now.

The record of the court of inquiry was then sent to the classification board, which placed relator in class B. Following his final classification, a board of officers (referred to as the
71 "Honest and Faithful Board") was convened, as provided in the act, to determine the cause of such classification. The board held that relator's classification was due to his own neglect, misconduct or avoidable habits, and he was accordingly discharged from the army.

We think the statute is not difficult of construction, since it expressly provides that the record made by the court of inquiry shall be reviewed by the classification board for the purpose of the final determination of the class to which the officer belongs. There is nothing in the statute, however, which provides that the Honest and Faithful Board, convened for the determination of "whether such classification is due to his neglect, misconduct or avoidable habits," shall be confined to the record made before the court of inquiry. The duty of the Final Classification Board is to determine the general classification to which the officer belongs, while the duty imposed upon the Honest and Faithful Board is to ascertain, as a basis for his retirement from the service, whether or not the disqualification resulted from the officer's own misconduct or from causes over which he had no control. Therefore, the record made before the court of inquiry might or might not contain material pertinent to the investigation which the statute imposes upon the Honest and Faithful Board.

Objection is made that relator was not given notice of the hearing before the Honest and Faithful Board or an opportunity afforded him to be heard personally and by counsel in his own defense. It also appears that one member of the board had formerly sat as a member of an administrative board which had classified relator as a "misfit" for the duties which he was then performing. It is, therefore, urged that through lack of notice he was deprived of an opportunity to take exception to the personnel of the board.

But, this contention may be laid aside, since, in our view, the case turns upon a question of jurisdiction. Upon the following order relator was dismissed from the army: "The action of the

classification board in finally classifying Colonel William
72 F. Creary, Infantry, in class B is approved by the President and by his direction, a board of officers having determined that such classification is due to the officer's neglect, misconduct, and avoidable habits, Colonel Creary is discharged from the service under the provisions of section 24*b* of the act of Congress approved June 4, 1920. (Signed) W. R. Williams, Assistant Secretary of War."

It appears that this order was made under authority of a general order of the President authorizing the Secretary of War to take such action in the name of the President as might be necessary in carrying out the provisions of the statute in respect of the classification and retirement or discharge of officers thereunder. The question which at once suggests itself is, whether the authority conferred by the statute upon the President is such that it could be legally delegated to the Secretary of War. It is well settled that where the duty imposed upon the President is judicial in character, it may not be delegated away. Runkle vs. United States, 122 U. S., 543.

In that case, the appeal was from a judgment of the Court of Claims in a suit for longevity pay as an officer in the United States army. The case turned upon the legality of Runkle's discharge from the service, where the President has failed to review the court-martial proceedings. The duty of the President to review court-martial proceedings was the principal question before the court. It was held to be a judicial function expressly imposed by statute, and, as such, could not be delegated away. A court-martial is defined in the opinion of the court as follows: "A court-martial organized under the laws of the United States is a court of special and limited jurisdiction. It is called into existence for a special purpose and to perform a particular duty. When the object of its creation has been accomplished it is dissolved. * * * Their authority is statutory, and the statute under which they proceed must be followed throughout. The facts necessary to show their jurisdiction and that
73 their sentences were conformable to law must be stated positively; and it is not enough that they may be inferred argumentatively." It follows, therefore, that proceedings in court-martial are judicial in character.

True, in the Runkle case, as here, the order involved the dismissal of an officer from the army. But there the statute expressly provided that no "sentence of a general court-martial, in the time of peace, extending to the loss of life, or the dismission of a commissioned officer, or which shall, either in time of peace or war, respect a general officer, be carried into execution, until after the whole proceedings shall have been transmitted to the Secretary of War, to be laid before the President of the United States, for his confirmation or disapproval, and orders, in the case." The officer was court-martialled for misconduct, convicted, and, as a penalty, dismissed from the service. The proceedings related to the discipline of the army.

Here we are dealing with a general act of Congress for the reorganization of the army, and the proceedings relate to the classification of the officers—those classified in class A to be retained, and

those classified in class B to be retired or dismissed according to the cause of unfitness. The proceedings are purely administrative, and do not partake in any sense of a judicial character. Relator has no property right in the office to which he seeks reinstatement (Taylor and Marshall vs. Beckham, 178 U. S., 548); no contract right is involved (Butler vs. Pennsylvania, 10 How., 402); and the office he held was revocable by the sovereignty at will (Crenshaw vs. United States, 134 U. S., 99). In other words, the relator's rights are measured by the statute. Reaves vs. Ainsworth, 219 U. S., 296; Ex parte Garland, 4 Wall., 333, 378.

The President, as commander-in-chief of the army and navy, is vested with wide administrative and executive power, and, unless the exercise thereof is made judicial by express provision of statute, or is such by clear implication, authority may be given by the President to the proper head of a department to act for him and in his name. The power of the President to delegate authority to the
74 Secretary of War in military affairs is expressed in section 216, R. S., as follows: "The Secretary of War shall perform such duties as shall from time to time be enjoined on or intrusted to him by the President relative to military commissions, the military forces, the warlike stores of the United States, or to other matters respecting military affairs; and he shall conduct the business of the Department in such manner as the President shall direct." This implies authority in the President to impose upon the Secretary of War the administration in his name or by his order of much of the general executive power reposed in him as commander-in-chief of the army. The limitation upon the power of the President to so delegate his authority in administrative military affairs seems to extend only to those cases where he is expressly or by clear implication required by statute to act in his individual official capacity.

Nothing in the present statute relating to the classification of officers imposes a judicial duty upon the President to review the findings of the final classification board or personally to issue the order of approval or disapproval. The duty is purely executive, and can be performed lawfully by the Secretary of War. As was said in the Runkle case: "There can be no doubt that the President, in the exercise of his executive power under the Constitution, may act through the head of the appropriate executive department. The heads of departments are his authorized assistants in the performance of his executive duties, and their official acts, promulgated in the regular course of business, are presumptively his acts. That has been many times decided by this court. Wilcox vs. Jackson, 13 Pet., 498, 513; United States vs. Eliason, 16 Pet., 291, 302; Confiscation Cases, 20 Wall., 92, 109; United States vs. Farden, 99 U. S., 10, 19; Wolsey vs. Chapman, 101 U. S., 755, 769."

The President may, of course, perform this function personally, or, as in this instance, he may delegate it to the Secretary of
75 War. But, in either case, it is an administrative order of the President, and, as such, must be vacated as a condition precedent to reinstatement under the writ. But this cannot be accomplished in this proceeding, since the executive and administra-

tive action of the President cannot be controlled by mandamus. In Marbury vs. Madison, 1 Cranch, 137, it was held that the writ of mandamus may issue against the heads of departments to compel the performance of a purely ministerial act, not involving judgment or discretion; but this case has been generally construed as holding that courts have no jurisdiction to compel the President by mandamus to perform even a purely ministerial act incidental to his office.

In Mississippi vs. Johnson, 4 Wall., 475, where the State of Mississippi sought by injunction to restrain President Johnson from the execution of the Reconstruction Acts of Congress, upon the ground that they were unconstitutional, the court clearly declared that it was without jurisdiction either to compel the execution of a constitutional law by the President, or to restrain him from executing unconstitutional legislation. The reason for the refusal of the court to exercise the power was stated in the opinion as follows: "Suppose the bill filed and the injunction prayed for allowed. If the President refuse obedience, it is needless to observe that the court is without power to enforce its process. If, on the other hand, the President complies with the order of the court and refuses to execute the acts of Congress, is it not clear that a collision may occur between the executive and legislative departments of the government? May not the House of Representatives impeach the President for such refusal? And in that case could this court interfere, in behalf of the President, thus endangered by compliance with its mandate, and restrain by injunction the Senate of the United States from sitting as a court of impeachment? Would the strange spectacle be offered to the Public world of an attempt by this court to arrest proceedings in that court?"

76 Since, therefore, we are without jurisdiction to compel the vacation of the order of dismissal from the service, the reinstatement of relator cannot be accomplished in this proceeding. Of course, if it is apparent that injustice has been done, the power lies with the President, upon the petition of the relator, to vacate the order and direct a rehearing by the final classification board. The courts, however, are powerless to compel such action.

The judgment is reversed with costs, and the cause remanded for further proceedings not inconsistent with this opinion.

Reversed and remanded.

77 January Term, 1922.

Tuesday, January 3rd, A. D., 1922.

* * * * * * *

No. 3693.

JOHN W. WEEKS, Secretary of War, Appellant,

vs.

THE UNITED STATES OF AMERICA ex Relatione WILLIAM F. CREARY.

Appeal from the Supreme Court of the District of Columbia.

This cause came on to be heard on the transcript of the record from the Supreme Court of the District of Columbia and was argued by counsel. On consideration whereof, It is now here ordered and adjudged by this Court that the judgment of the said Supreme Court in this cause be and the same is hereby reversed with costs, and that this cause be and the same is hereby remanded to the said Supreme Court for further proceedings not inconsistent with the opinion of this court.

Per MR. JUSTICE VAN ORSDEL.

January 3, 1922.

In the Court of Appeals of the District of Columbia

No. 3693.

No. 21, Special Calendar.

JOHN W. WEEKS, Secretary of War, Appellant,

vs.

UNITED STATES OF AMERICA ex Relatione WILLIAM F. CREARY, Appellee.

Motion for Writ of Error.

Now comes the Appellee in the above-entitled cause and prays the Court for a writ of error to remove the same to the Supreme Court of the United States; to stay mandate; and to fix a nominal bond to act as a supersedeas; and for cause shows:

1. That writ of error lies under paragraph 3 of Section 250 of the Judicial Code in that the Appellee, in being deprived of his office as an officer of the Army of the United States, was denied due process of law guaranteed to him by the Constitution of the United States.

2. That writ of error lies under paragraph 5 of Section 250 of the Judicial Code in that the existence of the authority of the President of the United States to delegate to the Secretary of War the power

(*a*) to approve the action of the Final Classification Board

(*b*) to approve the action of the Board of Officers

(*c*) to discharge the Appellee from the Army of the United States under the purported authority of Section 24*b* of the Act of June 4, 1920, known as the Army Reorganization Act,

is drawn in question.

3. That writ of error lies under paragraph 5 of Section 250 of the Judicial Code in that the existence of the authority or power of the Secretary of War

(*a*) to approve the finding of the Final Classification Board

(*b*) to approve the finding of the Board of Officers

(*c*) to discharge the Appellee from the Army of the United States

is drawn in question.

79 4. That writ of error lies under paragraph 5 of Section 250 of the Judicial Code in that the exercise of the power of the Secretary of War to discharge the Appellee from the Army of the United States without a hearing before the Board of Officers is drawn in question.

5. That writ of error lies under paragraph 6 of Section 250 of the Judicial Code for that the construction of Section 24*b* of the Act of June 4, 1920, known as the Army Reorganization Act, is drawn in question by the respondent who relies upon said Act as authority for the approval of the action of the Final Classification Board, the Board of Officers, and as authority for his right to discharge the Appellee from the Army of the United States.

Respectfully submitted,

SAMUEL T. ANSELL,
EDWARD S. BAILEY,
CHARLES POPE CALDWELL,
Attorneys for the Appellee, William F. Creary.

Service of copy of the above received today.
PEYTON GORDON,
U. S. Attorney.
Jan. 16/22

(Endorsed:) No. 3693. John W. Weeks, Secretary of War, Appellant, vs. United States of America ex rel. William F. Creary. Motion for writ of error. Court of Appeals, District of Columbia. Filed Jan. 16, 1922. Henry W. Hodges, Clerk.

80 Friday, January 20th, A. D. 1922.

* * * * * * *

No. 3693.

JOHN W. WEEKS, Secretary of War, Appellant,

vs.

THE UNITED STATES OF AMERICA ex Relatione WILLIAM F. CREARY.

On consideration of the motion for the allowance of a writ of error to remove the above entitled cause to the Supreme Court of the United States and to stay the mandate until further order, It is ordered by the Court that said motion be and the same is hereby granted, and the bond to act as supersedeas is fixed at the sum of three hundred dollars.

81 In the Court of Appeals of the District of Columbia.

No. 3693.

JOHN W. WEEKS, Secretary of War, Appellant,

v.

UNITED STATES OF AMERICA ex Relatione WILLIAM F. CREARY, Appellee.

Assignments of Error.

William F. Creary, the appellee herein and plaintiff in error, hereby assigns error in the final order or judgment of the Court of Appeals of the District of Columbia entered on the 3d day of January, 1922, in the following particulars:

1. The Court of Appeals of the District of Columbia erred in holding that the Secretary of War had the power to review and approve the action of the Final Classification Board, the action of the Board of Officers and to discharge William F. Creary from the Army of the United States.

2. The Court of Appeals erred in holding that the Secretary of War had the power to discharge William F. Creary from the Army of the United States without notice and the opportunity being given him to appear and be heard before the Board of Officers convened to determine the cause of his classification, as provided by the Act of June 4, 1920, 41 Stat. L. 759, 773.

3. The Court of Appeals erred in holding that the President had the power to delegate to the Secretary of War the authority to review and approve the action of the Final Classification Board, the action of the Board of Officers and to discharge William F. Creary from the Army of the United States.

82 4. The Court of Appeals erred in holding that the duty required of the President by the said Act of June 4, 1920, to review the action of the Final Classification Board and the Board of Officers, and his power to discharge an officer from the Army of the United States under said act, are administrative and not judicial, and can be delegated.

5. The Court of Appeals erred in holding that the duty required by said Act of June 4, 1920, to review the action of the Final Classification Board and the Board of Officers and the power given by said act to discharge an officer from the Army, need not be exercised personally by the President.

6. The Court of Appeals erred in holding that it was without jurisdiction to compel the Secretary of War to vacate the order made by the Secretary of War discharging William F. Creary from the Army and to restore him to his office as colonel in the Army of the United States from which he had been discharged.

SAMUEL T. ANSELL,
EDWARD S. BAILEY,
Attorneys for William F. Creary.

83 [Endorsed:] In the Court of Appeals of the District of Columbia. No. 3693. John W. Weeks, Secretary of War, Appellant, vs. United States of America, ex rel. William F. Creary, Appellee. Assignments of Error. Court of Appeals, District of Columbia. Filed Jan 26 1922. Henry W. Hodges, clerk. Ansell & Bailey, Attorneys at Law, Albee Building, Washington, D. C.

84 UNITED STATES OF AMERICA, ss:

The President of the United States to the Honorable the Justices of the Court of Appeals of the District of Columbia, Greeting:

Because in the record and proceedings, as also in the rendition of the judgment of a plea which is in the said Court of Appeals before you, or some of you, between John W. Weeks, Secretary of War, Appellant and The United States of America, ex relatione William F. Creary, Appellee, a manifest error hath happened, to the great damage of the said Appellee, as by his complaint appears. We being willing that error, if any hath been, should be duly corrected, and full and speedy justice done to the parties aforesaid in this behalf, do command you, if judgment be therein given, that then under your seal, distinctly and openly, you send the record and proceedings aforesaid with all things concerning the same, to the Supreme Court of the United States, together with this writ, so that you have the same in the said Supreme Court at Washington, within 30 days from the date hereof, that the record and proceedings aforesaid being inspected, the said Supreme Court may cause further to be done therein to correct that error, what of right, and according to the laws and customs of the United States should be done.

Witness the Honorable William H. Taft, Chief Justice of the United States, the 26th day of January, in the year of our Lord one thousand nine hundred and twenty-two.

[Seal of Court of Appeals, District of Columbia.]

HENRY W. HODGES,
Clerk of the Court of Appeals
of the District of Columbia.

Allowed by

———.

85 (*Bond on Writ of Error.*)

Know all men by these presents, that we, William F. Creary, as principal, and United States Fidelity and Guaranty Company of Baltimore, Maryland, as surety, are held and firmly bound unto John W. Weeks, Secretary of War in the full and just sum of Three Hundred ($300.00) Dollars to be paid to the said John W. Weeks, Secretary of War, his certain attorney, executors, administrators, or assigns; to which payment, well and truly to be made, we bind bind ourselves, our heirs, executors, and administrators, jointly and severally, by these presents. Sealed with our seals and dated this 26th day of January in the year of our Lord one thousand nine hundred and twenty-two. Whereas, lately at a Court of Appeals of the District of Columbia, in a suit depending in said Court, between John W. Weeks, Secretary of War, Appellant, and United States of America, ex relatione William F. Creary, Appellee, #3693 a judgment was rendered against the said William F. Creary on the third day of January, nineteen hundred and twenty-two and the said William F. Creary having obtained a writ of error and filed a copy there of in the Clerk's office of the said Court to reverse the judgment in the aforesaid suit, and citation directed to the said John W. Weeks, Secretary of War citing and admonishing him to be and appear at a Supreme Court of the United States, to be holden at Washington, within thirty days from the date thereof

Now, the condition of the above obligation is such, That if the said William F. Creary shall prosecute said writ of error to effect, and answer all damages and costs if he fail to make his plea good, then the above obligation to be void; else to remain in full force and virtue.

WILLIAM F. CREARY, [SEAL.]
By EDWARD S. BAILEY, [SEAL.]
His Attorney.

[Seal of U. S. Fidelity & Guaranty Co.]

UNITED STATES FIDELITY & GUARANTY CO., [SEAL.]
By LEE B. MOSHER, [SEAL.]
Attorney in Fact.

Sealed and delivered in the presence of:
K. M. WATERS.
L. R. SAUR.
K. M. WATERS.
L. R. SAUR.

Approved by:
CONSTANTINE J. SMYTH,
Chief Justice Court of Appeals of the District of Columbia.

[Endorsed:] No. 3693. John W. Weeks, Secretary of War, Appellant, vs. U. S. ex rel., William F. Creary. Supersedeas Bond on Writ of Error. Court of Appeals, District of Columbia. Filed Jan. 26, 1922. Henry W. Hodges, clerk.

86 UNITED STATES OF AMERICA, *ss:*

To John W. Weeks, Secretary of War, Greeting:

You are hereby cited and admonished to be and appear at a Supreme Court of the United States, at Washington, within 30 days from the date hereof, pursuant to a writ of error, filed in the Clerk's Office of the Court of Appeals of the District of Columbia, wherein The United States of America, ex relatione, William F. Creary is plaintiff in error, and you are defendant in error, to show cause, if any there be, why the judgment rendered against the said plaintiff in error as in the said writ of error mentioned, should not be corrected, and why speedy justice should not be done to the parties in that behalf.

Witness, the Honorable Constantine J. Smyth, Chief Justice of the Court of Appeals of the District of Columbia, this 26th day of January, in the year of our Lord one thousand nine hundred and twenty-two.

CONSTANTINE J. SMYTH,
Chief Justice of the Court of Appeals of the District of Columbia.

Service acknowledged.
PEYTON GORDON,
United States Attorney,
Counsel for Secretary of War.

Jan. 26, 1922.

87 Court of Appeals of the District of Columbia.

I, Henry W. Hodges, Clerk of the Court of Appeals of the District of Columbia, do hereby certify that the foregoing printed and typewritten pages numbered from 1 to 86 inclusive constitute a true copy of the transcript of record and proceedings of said Court of Appeals in the case of John W. Weeks, Secretary of War, appellant, vs. The United States of America, ex relatione William F. Creary,

No. 3693, January Term, 1922, as the same remain upon the files and records of said Court of Appeals.

In testimony whereof I hereunto subscribe my name and affix the seal of said Court of Appeals, at the City of Washington, this 27th day of january, A. D. 1922.

[Seal of Court of Appeals, District of Columbia.]

HENRY W. HODGES,
Clerk of the Court of Appeals of the District of Columbia.

Endorsed on cover: File No. 28,680. District of Columbia Court of Appeals. Term No. 725. The United States of America *ex relatione* William F. Creary, plaintiff in error, vs. John W. Weeks, Secretary of War. Filed January 30th, 1922. File No. 28,689.

In the Supreme Court of the United States.

OCTOBER TERM, 1921.

THE UNITED STATES OF AMERICA EX RELATIONE JOHN W. FRENCH, plaintiff in error,
v.
JOHN W. WEEKS, SECRETARY OF WAR. } No. 724.

THE UNITED STATES OF AMERICA EX RELATIONE WILLIAM F. CREARY, plaintiff in error,
v.
JOHN W. WEEKS, SECRETARY OF WAR. } No. 725.

IN ERROR TO THE COURT OF APPEALS OF THE DISTRICT OF COLUMBIA.

MOTION BY DEFENDANT IN ERROR TO ADVANCE.

Comes now the defendant in error by the Solicitor General of the United States and moves the court to advance the above-entitled causes and set them for hearing together on as early a date of the present term as may be convenient to the court.

These cases involve the construction and administration of section 24b of the National Defense Act of June 3, 1916 (39 Stat. 166), as amended by the act of June 4, 1920 (41 Stat. 759).

91273—22

The facts in the two cases are identical, except that in No. 724 John W. French, the plaintiff in error, was retired from active service with the pay and allowances in such case provided by the statute, whereas in case No. 725 William F. Creary, the plaintiff in error was discharged from the Army without pay.

Both plaintiffs in error, who formerly were officers of the United States Army on the active list with the rank of colonel, filed petitions in the Supreme Court of the District of Columbia challenging the legal validity and effectiveness of the proceedings under the statute that resulted in their respective retirement and discharge, the prayers of said petitions being that writs of mandamus issue commanding the respondent, Newton D. Baker, then Secretary of War (the present defendant in error having succeeded to the office of Secretary of War, and the court having made an order substituting him for the original respondent), to reinstate each of said plaintiffs in error in the office of colonel on the active list in the Regular Army of the United States. Answers to the petitions were filed, and the relators (now plaintiffs in error) demurred thereto. The demurrers were argued together; and judgments were entered April 29, 1921, directing that peremptory writs of mandamus issue against the present defendant in error, commanding him to vacate the military orders by which plaintiffs in error were retired and discharged, respectively, and to reinstate them in their former offices and status as colonels of Infantry on the active

list of the Army. Upon review by the Court of Appeals of the District of Columbia, that court held that the courts were without jurisdiction to compel the military orders aforesaid to be vacated and that the reinstatement of the relators could not be accomplished in these proceedings. The said Court of Appeals accordingly reversed each of said judgments of the Supreme Court of the District of Columbia. The cases now are before this court on writs of error to the Court of Appeals of the District of Columbia.

The elimination of officers from the active service by retirement and discharge in consequence of proceedings under section 24b of the statute aforesaid has created vacancies in the Army, to wit, 113 vacancies, all of them under proceedings inaugurated by the 1920 provisional classification board. Further vacancies under proceedings inaugurated by the 1921 board are to be expected in the immediate future. The filling of said 113 vacancies, although required by the needs of the Army, has been delayed and embarrassed, because of doubt and uncertainty, created by the pendency of the above-entitled causes, as to the validity and legal effectiveness of said 113 elimination proceedings, which validity and effectiveness could not be sustained in any of these cases if the contentions submitted for adjudication by the relators (now plaintiffs in error) herein are sound.

The 113 vacancies aforesaid have accordingly not yet been filled, but in lieu thereof only 78 of said vacancies have been filled by the promotion of other

Army officers, whose nominations, confirmations, and appointments in the new grades have been made, but without express reference in each case to the specific vacancy filled, the present practice differing from that considered in *Blake* v. *United States* (103 U. S. 227). If these 78 appointments to office are invalid because of lack of vacancies to be filled or otherwise, grave injury and disadvantage to the Army and to the War Department will result, which said injury and disadvantage will be great in proportion to the length of time elapsing before the defect can be cured.

Should it be determined that the action of the War Department in retiring and discharging officers under the statute was improper, ineffective, and illegal, several hundred persons who now and for a considerable time are and have been regarded by the War Department as not being connected with the active service would seem to have been deprived unlawfully of valuable rights, and the further deprivation thereof for any length of time that is avoidable would seem to be unwarranted.

It is important, therefore, to the War Department, to the Army at large, to the particular officers concerned, and to the general public that the filling of vacancies required by the Army should not be delayed longer than necessary, that doubt as to the status of those actually appointed to fill apparent vacancies should be removed as soon as possible, and that the possibility of being required to conduct

elimination proceedings a second time with reference to the same officers be obviated as soon as possible; wherefore, it is respectfully submitted that the present motion to advance for hearing is entitled to the favorable consideration of this court.

Opposing counsel concur in this motion.

JAMES M. BECK,
Solicitor General.

WASHINGTON, D. C., *February 27, 1922.*

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In the Supreme Court of the United States.

OCTOBER TERM, 1921

THE UNITED STATES OF AMERICA, ex rel. John W. French, *Plaintiff in Error*, *vs.* JOHN W. WEEKS, SECRETARY OF WAR, *Defendant in Error.* — No. 724.

THE UNITED STATES OF AMERICA, ex rel. William F. Creary, *Plaintiff in Error*, *vs.* JOHN W. WEEKS, SECRETARY OF WAR, *Defendant in Error.* — No. 725.

BRIEF OF PLAINTIFFS IN ERROR.

Statement of the Case.

These cases are here on writs of error to the Court of Appeals of the District of Columbia (pars. 3, 5, and 6, Section 250 Jud. Code) for the review of the judgment of that court reversing the judgment of the Supreme Court of the District of Columbia awarding writs of mandamus against the defendant in error, commanding him to vacate an order purporting to discharge the plaintiff in error Colonel Creary from the Army of the United States and restore him to the office and status of a colonel of infantry, and to vacate an order purporting to retire the plaintiff in error Colonel French from the active serv-

ice of the Army of the United States and to restore him to the office and status of a colonel of infantry.

Colonel Creary and Colonel French were both officers of the Regular Army on the active list in the grade of colonel, with nearly 25 and 23 years of commissioned service respectively, when in November, 1920 the one was discharged from the Army and in December, 1920 the other was retired from active service, as a result of proceedings taken under Section 24b of the National Defense Act of June 4, 1920 (41 Stat. 759), which so far as pertinent here was as follows:

> "Sec. 24b. CLASSIFICATION OF OFFICERS.—Immediately upon the passage of this Act, and in September of 1921and every year thereafter, the President shall convene a board of not less than five general officers, which shall arrange all officers in two classes, namely: Class A, consisting of officers who should be retained in the service, and Class B, of officers who should not be retained in the service. Until otherwise finally classified, all officers shall be regarded as belonging to Class A, and shall be promoted according to the provisions of this Act to fill any vacancies which may occur prior to such final classification. No officer shall be finally classified in Class B until he shall have been given an opportunity to appear before a court of inquiry. In such court of inquiry he shall be furnished with a full copy of the official records upon which the proposed classification is based and shall be given an opportunity to present testimony in his own behalf. The record of such court of inquiry shall be forwarded to the final classification board for reconsideration of the case, and after such consideration the finding of said classification board shall be final and not subject to further revision except upon the order of the President. Whenever an officer is placed in Class B, a board of not less than three officers shall be convened to determine whether such classification is due to his neg-

lect, misconduct, or avoidable habits. If the finding is affirmative, he shall be discharged from the Army; if negative, he shall be placed on the unlimited retired list with pay at the rate of 2½ per centum of his active pay multiplied by the number of complete years of commissioned service, or service which under the provision of this act is counted as its equivalent, unless his total commissioned service or equivalent service shall be less than ten years, in which case he shall be honorably discharged with one year's pay. The maximum retired pay of an officer retired under the provisions of this section prior to January 1, 1924, shall be 75 per centum of active pay, and of one retired on or after that date 60 per centum. If an officer is thus retired before the completion of thirty years' commissioned service, he may be employed on such active duty as the Secretary of War considers him capable of performing until he has completed thirty years' commissioned service."*

Both officers challenged the validity of the action taken on the ground that the proceedings being for the removal of an officer for cause specified by statute, and therefore judicial in character, were null and void because among other reasons (1) the classification and Honest and Faithful proceedings were not approved by the President, and (2) the Honest and Faithful Board gave the officers no notice and no opportunity to be heard. Alleging there-

*The military Tribunals provided by said section may be helpfully enumerated here:

A. *Upon question of classification:*
   1. Court of Inquiry
   2. Final Classification Board

B. *Whether classification is due to misconduct, neglect, or avoidable habits:*
   1. Board of Officers.

      This Board is commonly known in the Department as the "Honest and Faithful Board," and is so called because military service upon its termination is always characterized as "Honest and Faithful" or "Not Honest and Faithful," the latter being resorted to when the service is found to have been "without honor" or is terminated because of misconduct.

fore that they were deprived of their office by the unlawful action and order of the Secretary of War, these officers filed their petitions for writs of mandamus to compel the Secretary to vacate the said orders and restore the officers. The petitions were filed on January 3, 1921, in the Creary case (Creary R. 1) and on January 21, 1921, in the French case (French R. 1). Answers by Newton D. Baker, then Secretary of War, were filed on January 25, 1921 (Creary R. 7) (French R. 8). Demurrers to the answers were filed January 31, 1921 (Creary R. 7) (French R. 20). On March 10, 1921, by consent of counsel, defendant in error, John W. Weeks, was substituted in place of Newton D. Baker, as party defendant (Creary R. 17) (French R. 21-22).

On March 12, 1921 the Supreme Court of the District of Columbia (McCoy, C. J.) sustained the demurrers to the answers (Creary R. 18) (French R. 22). After considering and overruling certain motions filed on behalf of the defendant in error, the court on April 29, 1921 entered judgments awarding writs of mandamus against the defendant in error commanding him respectively to vacate the order dated the 17th day of November, 1920, purporting to discharge Colonel William F. Creary from the Army of the United States and restore Colonel Creary to the office and status of Colonel of Infantry in the Army as of the 17th day of November, 1920, and to the rights incident and belonging to said office and status of which he was deprived by said order (R. 49-50), and to vacate the order dated the 24th day of December, 1920, purporting to retire Colonel John W. French from active service of the United States Army and to restore Colonel French to the office and status of Colonel of Infantry in the Army of the United States as of the 24th day of December, 1920, and to the rights incident to the office and status of which he was deprived by said order (R. 52).

Facts of Colonel Creary's Case.

Colonel Creary enlisted in the Regular Army of the United States on the 19th day of January, 1893, and served as private, corporal, and sergeant from the date of his enlistment to the 23rd day of March, 1896; that after and as a result of a competitive examination he was duly nominated, confirmed by the Senate, appointed and commissioned from the ranks of the Army, second lieutenant, Infantry, the 5th day of March, 1896; that thereafter in due course of lineal promotion he was, after due examination and a finding of moral, professional, and physical qualification, nominated, confirmed, appointed, and commissioned first lieutenant the 12th day of August, 1898; captain the 9th day of April, 1901; major the 1st day of July, 1916; lieutenant colonel (in the temporarily increased regular establishment) the 5th day of August, 1917; colonel (in the temporarily increased regular establishment) on the same day; and lieutenant colonel in the Regular Army the 27th day of December, 1919; and was duly appointed and commissioned by promotion, colonel in the Regular Army on July 20, 1920, and served in such status until the 23rd day of November, 1920, when he received the following order:

"WAR DEPARTMENT
Washington

Special Orders No. 271-O } November 17, 1920

PEM 423

EXTRACT

CONFIDENTIAL

69. Colonel William F. Creary, Infantry, having been finally classified in Class B, for causes due to his neglect, misconduct, and avoidable habits, his discharge from the

Army, by direction of the President, under the provisions of Section 24b of the Act of Congress approved June 4, 1920, is announced.

By order of the Secretary of War:

PEYTON C. MARCH,
Major-General, Chief of Staff.

Official
P. C. HARRIS,
The Adjutant General

For Official Use Only
Not To Be Made Public."

(Creary R. 1-2)

In June, 1920, plaintiff in error was informed by the War Department that a Classification Board convened by virtue of the authority of said Section 24b had provisionally arranged him in Class B as unfit to be retained in the service. Upon such notification, he requested, by virtue of the authority of said section, a Court of Inquiry, and accordingly a Court was convened by the President at the Headquarters, Sixth Corps Area, Chicago, Illinois, September 21, 1920 to consider and make its recommendation upon—it being without power to decide—the question whether plaintiff in error should be continued in Class B. Plantiff in error appeared before said Court of Inquiry without counsel. The provisional classification board reported it had "examined into the record of Col. William F. Creary, Inf., and upon consideration of his record as a whole from the date of his first commission in the Army of the United States to the present date, finds that he should not be retained in the service." Full copy of the plaintiff in error's record as a whole from the date of his first commission in the Army of the United States to the present date (that is, the date of the proceedings of the provisional classification board) was not furnished him, but instead he was only furnished copies of brief

extracts from his record containing all the unfavorable portions of his record and omitting all favorable portions (Creary R. 3). He was permitted to examine his original record by the Court of Inquiry in its presence only and at its session.

After receiving the copy of the proceedings of the Court of Inquiry, he heard nothing whatever concerning his case until he received the order of discharge of November 17, 1920, hereinbefore referred to (Creary R. 2). He had no notice or knowledge of the convening of the Final Classification Board nor of any proceeding, action, or finding of said board; nor of the convening of the Board of Officers (the "Honest and Faithful Board") to determine whether the classification thus finally made by the Final Classification Board was due to neglect, misconduct, or avoidable habits; nor of any proceeding, action or finding of such Honest and Faithful Board (Creary R. 4). The proceedings of said Boards were had privately and secretly (Creary R. 5). Plaintiff in error had no opportunity to appear before the Final Classification Board to present argument before that board upon the law and the facts; nor had he any opportunity to petition the President for a revision of the action of such board. Nor had he any opportunity to appear before the Honest and Faithful Board, to adduce testimony upon the issue whether the final classification was due to his neglect, misconduct, or avoidable habits, the issue which was before that board for determination, or to present argument upon the law and the facts before that board; nor to petition the President for a revision of the action of that board (Creary R. 5).

The proceedings in his case were never presented to the President; nor did the President ever consider or act upon them. The Secretary of War himself, without conferring with the President about the case, approved the finding

of the Final Classification Board and the Honest and Faithful Board, and discharged the plaintiff in error from the Army, assuming to do so because of the supposed general authority conferred upon him by the President which will hereinafter appear (Creary R. 9). The answer of the defendant in error shows that sometime prior to entering upon the classification of officers pursuant to said Section 24b, the Secretary of War laid before the President the manner of procedure to be followed and the action to be taken in all cases of classification and determination under the provision of Section 24b, and received from the President the general authority and direction that he, as Secretary of War, should in all such cases take such action in the name of the President and by his authority by way of approval, revision, or otherwise as from the circumstances shown by the record in each such case appeared to him, the Secretary of War, to be right and proper; and that pursuant to such general authority and direction the Secretary of War and the Assistant Secretary of War took in this case, as appears by his answer, the following action:

> "1. The signing by this defendant, on behalf and by authority of the President, at the foot of the record of the final classification board, but prior to the submission of such record to the board to determine the cause of plaintiff's classification, of the following notation:
> 'Approved,
>
> BAKER,
> *Secretary of War.*'
>
> "2. The signing by this defendant on behalf and by authority of the President, at the foot of the record of the board to determine the cause of plaintiff's classification, of the following notation:
> 'Majority report approved,
>
> BAKER,
> *Secretary of War.*'

"3. The reading by this defendant in person of the records of the preliminary classification board, the court of inquiry, the final classification board, and the board to determine the cause of classification, in plaintiff's case, and the signing by W. R. Williams, Assistant Secretary of War, pursuant to instructions to that effect given him by this defendant after such reading, and on behalf of and by authority of the President, on November 17, 1920, subsequent to the action of the board to determine the cause of plaintiff's classification, of an instrument of approval, a copy of which is annexed to this answer and marked Exhibit 1, which is prayed to be taken as a part hereof.

"4. The issuance on November 17, 1920, by order of this defendant on behalf and by authority of the President of a special order discharging plaintiff from the United States Army, of which a true copy, marked Exhibit 2, is attached hereto, and prayed to be taken as a part hereof." (Creary R. 9-10.)

The pleadings also show that the record of the Court of Inquiry was never transmitted to the Judge Advocate General of the Army for his review or revision; and that one member of the provisional classification board had previously made an adverse report on plaintiff in error's efficiency, one member of the final classification board had made a like report, and one member of the board convened to determine the cause of plaintiff in error's classification had sat as a member of a board administratively convened which had classified him as a "misfit."

One Distinguishing Feature of Col. French's Case

The facts in the two cases are parallel except in this: The Honest and Faithful Board decided that the classification was not due to the misconduct, neglect, or avoidable habits of the officer concerned in the case of Colonel French, as a consequence of which he was placed upon the

retired list with honor and retired pay; but that Board held the classification of Colonel Creary was due to his misconduct, neglect, or avoidable habits, and accordingly he was discharged from the Army, completely separated from it, without honor and without pay.

Action by Courts Below.

The Supreme Court sustained the demurrer in the Creary case upon the grounds (1) "that the President's individual action is called for in consideration of the findings of the Final Classification Board" and (2) "that the relator was entitled to notice of the charges against him and to a hearing before the Board of Officers to determine the cause of final classification" (Creary R. 27-30), and in the French case upon the ground that the President's individual action is called for in consideration of the findings of the Final Classification Board (French R. 29).

The Court of Appeals reversed the judgment of the Supreme Court and in its opinion and as ground for its action held: (a) that the duty required of the President by the Act of June 4, 1920 (41 Stat. L. 759-773) to review the action of the Final Classification Board and the Board of Officers and the power conferred upon him by said Act to discharge an officer from the Army of the United States or to place an officer upon the retired list of the Army are administrative and not judicial and can therefore be delegated by him to the Secretary of War; and (b) that the court was without jurisdiction to grant relief since, in the view of the court, the action required of the President being administrative and delegable, the act of the Secretary of War was in effect the act of the President and for that reason was beyond judicial control.

Assignments of Error in Col. Creary's Case.

1. The Court of Appeals of the District of Columbia erred in holding that the Secretary of War had the power

to review and approve the action of the Final Classification Board, the action of the Board of Officers, and to discharge William F. Creary from the Army of the United States.

2. The Court of Appeals erred in holding that the Secretary of War had the power to discharge William F. Creary from the Army of the United States without notice and the opportunity being given him to appear and be heard before the Board of Officers convened to determine the cause of his classification as provided by the Act of June 4, 1920, 41 Stat. L. 759, 773.

3. The Court of Appeals erred in holding that the President had the power to delegate to the Secretary of War the authority to review and approve the action of the Final Classification Board, the action of the Board of Officers, and to discharge William F. Creary from the Army of the United States. (R. 72)

4. The Court of Appeals erred in holding that the duty required of the President by the said Act of June 4, 1920, to review the action of the Final Classification Board and the Board of Officers, and his power to discharge an officer from the Army of the United States under said Act, are administrative and not judicial, and can be delegated.

5. The Court of Appeals erred in holding that the duty required by said Act of June 4, 1920, to review the action of the Final Classification Board and the Board of Officers, and the power given by said act to discharge an officer from the Army, need not be exercised personally by the President. (R. 73)

6. The Court of Appeals erred in holding that it was without jurisdiction to compel the Secretary of War to vacate the order made by the Secretary of War discharging William F. Creary from the Army and to restore him to his office as colonel in the Army of the United States from which he had been discharged. (R. 73)

Assignments of Error in Col. French's Case.

1. The Court of Appeals of the District of Columbia erred in holding that the Secretary of War had the power to review and approve the action of the Final Classification Board, the action of the Board of Officers, and to place John W. French upon the retired list of the Army of the United States.

2. The Court of Appeals erred in holding that the President had the power to delegate to the Secretary of War the authority to review and approve the action of the Final Classification Board, the action of the Board of Officers, and to place John W. French upon the retired list of the Army of the United States.

3. The Court of Appeals erred in holding that the duty required of the President by the Act of June 4, 1920 (41 Stat. 1. 759-773) to review the action of the Final Classification Board, and the Board of Officers, and his power to place an officer upon the retired list of the Army of the United States under said Act, are administrative and not judicial, and can be delegated.

4. The Court of Appeals erred in holding that the duty required by the said Act of June 4, 1920 to review the action of the Final Classification Board and the Board of Officers, and the power given by that Act to place an officer upon the retired list of the Army of the United States need not be exercised personally by the President.

5. The Court of Appeals erred in holding that it was without jurisdiction to compel the Secretary of War to vacate the order made by the Secretary of War placing John W. French upon the retired list of the Army of the United States, and to restore him to his office as colonel upon the active list of the Army of the United States from which he had been retired. (R. 74)

Argument.

I.

THE SECRETARY OF WAR'S "APPROVAL" OF THE FINAL CLASSIFICATION OF THESE OFFICERS AND OF THE HONEST AND FAITHFUL BOARD'S PROCEEDINGS IN THE CASE OF COLONEL CREARY WAS WITHOUT AUTHORITY OF LAW AND NULL AND VOID.

1. *The law requires Presidential review and action.*

(a) It is held throughout and by all that the law requires the President to review the proceedings of the classification board and of the Honest and Faithful Board. The President was of that opinion; but misconceiving, as we think, the judicial character of his duty, he undertook to make a general delegation of it in all cases to the Secretary of War (Creary, 9). The Supreme Court and the Court of Appeals also agreed as to the necessity of Presidential action but differed as to whether it was judicial or administrative in character.

(b) The statute clearly imposes the duty of Presidential review.

It designates a Court of Inquiry and Military Boards to hear and determine the question of classification and the causes therefor, and specifically provides that the President shall be the convening authority. Courts of Inquiry and Military Boards are of such a nature that their proceedings must necessarily be reviewed by the authority convening them (*Winthrop's Military Law and Precedents*, pp. 795–822). The statute makes express reference to the President's power of revision.

The then President seems to have had no doubt that he was the reviewing authority in all cases; and such is the view of the present President, as indicated by the Regulations established by him.

2. *The proceedings themselves are judicial in character, and so, necessarily, must be the Presidential review of them. That review therefore can not be delegated.* (*Runkle* v. *United States*, 122 U. S. 543; *United States* v. *Page*, 137 U. S. 673; *United States* v. *Fletcher*, 148 U. S. 84).

(a) The Presidential review is inherently judicial.

The statute provides for the removal of officers of the Army for causes specified which affect their good name, standing, and honor. If the officer is found inefficient, he can no longer remain on the active list, and if his inefficiency is found to be due to his own misconduct, neglect, or avoidable habits, then he is to be separated from the Army absolutely, discharged "without honor" and without pay. Where such is the case, in accordance with a fundamental principle of our law, the proceedings are judicial. *Runkle* v. *United States*, 122 U. S. 542; *Reagan* v. *United States*, 182 U. S. 419, 425; *Shurtleff* v. *United States*, 189 U. S. 311–314; *Kalbfus* v. *Siddons*, 42 App. D. C. 310, 318, and the many cases cited under Point II.

Reaves v. *Ainsworth*, 219 U. S. 296 and *Street* v. *United States*, 133 U. S. 299, heretofore relied upon by counsel on the other side, support him at no point, but proceed in recognition of the principles of law relied upon by us. The statute which constituted the law of the case in *Reaves* v. *Ainsworth* was one which authorized the President to establish a system of examination for *promotion*, not removal from office for specified cause. *That statute placed the entire power in the hands of the President; he could establish any system he pleased, without restriction.* The system which by regulation he did establish kept the power of final review over the examining boards in his own hands and this fact is emphasized in the opinion of the Court. That statute, for that purpose, gave unlimited power to the President; the present statute does nothing of the kind, but specifies the causes of removal,

and endows boards of a judicial character with power to determine such causes after hearing. These boards must grant the hearing and keep within their jurisdiction.

In the *Street* case, which arose under a statute the primary purpose of which was to reduce the Army (by honorable discharge and by discharge for cause without honor), the Department proceeded first to eliminate an officer *for cause* under Section 11 of the Act. That section expressly required a hearing for such elimination. The Department finding it could not get the witnesses, abandoned the hearing for cause and proceeded under section 12 of the Act which authorized the Department to create a list of *supernumerary* officers (officers who were not needed in the largely reduced Army) and *honorably discharged* such supernumeraries. This was not a removal *for cause*, but a method of muster-out of a large number of officers no longer needed, the war being over. All that the court held in that case was that the authorities had the right, of course, to withdraw the charges of removal for cause and proceed under the honorable muster-out section.

(b) That Congress legislated with that principle in view and contemplated proceedings of a judicial character is indicated also by the judicial character of the agencies designated for the purpose.

A Court of Inquiry, equally with a court-martial, is enumerated in the Articles of War as one of the several military tribunals (Articles 23, 24, 25, 26, 32, 38, 97–102); and a Military Board, statutorily designated, is a military tribunal, or agency, well recognized in the Articles of War, upon which all necessary powers for conducting a hearing are conferred by those Articles (Articles 23, 24, 25, 26, 32, 38).

(c) That Congress intended that every officer subjected to removal proceedings should have a full and fair hearing is clearly shown by the legislative history of said section.

The Committee Reports (No. 400, 66th Cong. 2nd Sess.), the statements of Committee spokesmen in debate (Cong. Rec., Vol. 59, No. 80, pp. 4626, 4629; Id. No. 82, pp. 4712–4724), as well as the testimony of the distinguished officers at the Committee hearings—all are to the effect that an officer should be heard fully by the Classification agencies and by the Honest and Faithful Board. The Committees in their reports and Committee spokesmen in debate said time and again that officers subjected to these proceedings "will have the general rights of an officer being tried by court-martial;" "will get a square deal;" that "in adopting this section of the bill," the Committee "denied it had any idea of setting up any star-chamber proceedings whatever." Mr. Greene, of Vermont, in charge of the bill in the House, said for the Committee:

> "I want to be understood that I myself and the Committee are sympathetic with the idea of giving these men all the chance they can have, and if there can be framed words to clarify this section, if it needs any clarification, that is what we desire. If the Committee has used language which does not seem to go to the extent that the temper of the House has unanimously indicated it should go, for my part I desire that the language should be made clear. That is the Committee's purpose." (Cong. Rec., Vol. 59, No. 80, p. 4630.)

II.

THE PROCEEDINGS OF THE HONEST AND FAITHFUL BOARD, HAD WITHOUT GIVING TO COLONEL CREARY NOTICE AND OPPORTUNITY TO BE HEARD, ARE NULL AND VOID.

The Board found that the classification of this officer was due to his misconduct, neglect, and avoidable habits. In the determination of such an issue due process requires specific charges, due notice of the same, an opportunity to

be heard and make answer, cross-examine the witnesses, and argue the law and facts. *Reagan* v. *United States*, 182 U. S. 419; *Shurtleff* v. *United States*, 189 U. S. 311; *Kalbfus* v. *Siddons*, 42 App. D. C. 310. In the footnote* we cite many state cases for this proposition, and we find none denying the principle.

III.

THE ORDER FOR COLONEL FRENCH'S RETIREMENT (FOR THE REASON STATED IN POINT I) AND THE ORDER FOR COLONEL CREARY'S DISCHARGE (FOR THE REASONS STATED IN POINTS I AND II) WERE WITHOUT AUTHORITY OF LAW, AND NULL AND VOID.

If, as we contend, the Classification of Colonels French and Creary required the approval of the President himself acting judicially, then the "approval" of the Secretary of War in both cases was null and void, and all subsequent proceedings predicated upon the validity of the classification were likewise null and void. And if, additionally in the case of Colonel Creary, the proceedings before the Honest and Faithful Board were null and void by reason of the denial to him of the required hearing, or if the proceedings of that Board required the judicial approval of the President, then for those reasons also the order for Colonel Creary's discharge was null and void.

The validity of the orders for retirement and discharge depends upon the validity of the proceedings had under

*In removal proceedings for cause an officer must be given a hearing: *Ekern* v. *McGovern, et al.*, 46 L. R. A., N. S. 797; *Dullam* v. *Willson*, 53 Mich. 392; *Page* v. *Hardin*, 8 B. Mon. 648; *Shumann* v. *McCartney*, 34 App. Div. 19, 53 N. Y. Supp. 1047; *Kasschan* v. *Police Comm.* 155 N. Y. 40; *State ex rel. Gill* v. *Watertown*, 9 Wis. 254; *Randall* v. *State*, 16 Wis. 340; *Larkin* v. *Noonan*, 19 Wis. 82; *Benson* v. *The People*, 10 Colo. App. 179; *Ham* v. *Board of Police of Boston*, 142 Mass. 90; *Metevier* v. *City of St. Louis*, et al., 90 Mo. 19 *Peck* v. *Commissioner of Brooklyn*, 106 N. Y. 65; *Attorney General* v. *Hogan*, 64 Ohio State 532; *Biggs* v. *McBride*, 17 Ore. 640; *Field* v. *Commonwealth*, 32 Pa. St. 478; *Com.* v. *Slifer*, 25 Pa. 34; *Hallgren* v. *Campbell*, 82 Mich. 255.

said section 24b, for it was by virtue of the authority of that section that the orders were issued. The suggestion made in argument in the Supreme Court of the District that the orders in both cases might be sustained under the 118th Article of War was properly met by the Chief Justice when he said:

> "That the relator might have been discharged under the 118th Article of War is not to the point. He was not discharged under that authority." (Creary 30.)

IV.

THE COURT BELOW HELD, INCONSISTENTLY, THAT ALTHOUGH COLONEL CREARY WAS ENTITLED TO A HEARING BEFORE THE HONEST AND FAITHFUL BOARD, WHICH IS TO THE EFFECT THAT THE PROCEEDINGS OF THAT BOARD WERE JUDICIAL IN CHARACTER, THE DUTY OF REVIEW IMPOSED UPON THE PRESIDENT WAS NEVERTHELESS ADMINISTRATIVE AND DELEGABLE TO THE SECRETARY OF WAR.

Such is the opinion of the court below as we understand it. The inconsistency pointed out demonstrates the fallacy of the decision of that court. We respectfully ask this court to test the reasoning of the Court of Appeals by that of the Supreme Court of the District (Chief Justice McCoy) as found in the two opinions in the record.

V.

THE SECRETARY OF WAR, HAVING UNLAWFULLY DISPOSSESSED THESE OFFICERS OF THEIR OFFICES, MANDAMUS IS THE PROPER REMEDY.

The Court of Appeals held not that mandamus was not the proper remedy if the Secretary of War himself had unlawfully dispossessed plaintiffs in error of their offices, but that in these cases the action of the Secretary of War was the action of the President, who had delegated

to the Secretary his authority to act; that therefore the writ was in legal effect directed against the President, who can not be reached by judicial process.

But that reasoning depends upon whether there was a valid delegation to the Secretary of War; if there was not, then the Secretary of War acted without authority and the writ properly lies to him.

Besides, if the proceedings of the Honest and Faithful Board were null and void, then, regardless of the necessity for presidential action and of what that action was, the Secretary of War can find no justification in any attempt of delegation to him. If the proceedings of that Board were null and void, there can be no justification for acting upon them. *Interstate Com. Com.* v. *L. & N. R. R.*, 227 U. S. 88.

In *Kalbfus* v. *Siddons*, 42 App. D. C. 310, the Court, in considering this question, said:

> "Since their order of removal was passed without notice and hearing, it necessarily follows that their action constituted an arbitrary exercise of power, and was void. The question, therefore, is presented whether mandamus is the appropriate remedy. The authorities are overwhelming that it is. 'A mandamus to restore,' says Lord Mansfield, 'is the true specific remedy where a person is wrongfully dispossessed of any office or function which draws after it temporal rights, in all cases where the established course of law has not provided a specific remedy by another form of proceeding.' *Rex* v. *Blooer*, 2 Burr. 1045. In *Harwood* v. *Marshall*, 9 Md. 83, an opposite case, it was ruled that mandamus was the appropriate remedy, because a judgment under quo warranto might remove the incumbent, but would not install the claimant in the office from which he had been illegally removed."

See, also, *Garfield* v. *Spalding*, 32 App. D. C. 153; *Ex rel. Moyer* v. *Baldwin*, 77 Ohio St. 532; *Chicago* v.

People, 210 Ill. 84; *Metzker* v. *Neally*, 41 Kans. 122; *Pratt* v. *Police and Fire Commissioner*, 15 Utah 1; *Miles* v. *Stevenson*, 80 Md. 358; *Field* v. *Malster*, 88 Md. 691; *People ex rel. Percival* v. *Cram*, 50 App. Div. 380 (N. Y.); *Sugden*, 174 N. Y. 87; *Garfield* v. *United States ex rel. Goldsby*, 211 U. S. 249. In the latter case the Court, speaking by Mr. Justice Day, said:

> "But, as has been affirmed by this court in former decisions, *there is no place in our constitutional system for the exercise of arbitrary power, and if the Secretary has exceeded the authority conferred upon him by law, then there is power in the courts to restore the status of the parties aggrieved by such unwarranted action.*"

Conclusion.

The statute under discussion prescribes the machinery, the methods, and the procedure for removing an officer from the service for cause, and requires, for the protection of the public as well as of the officer, a hearing of the officer and reviewing of the removal proceedings by the President. The Army is to be governed by law—by the law of Congress representing the people—and not by the autocratic will of a President, Secretary of War, or military authorities. The removal proceedings in these cases were in violation of the law.

We respectfully submit that the judgment of the Court of Appeals should be reversed with directions to that court to enter judgment affirming the judgment of the Supreme Court of the District of Columbia.

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Washington, D. C.,
March 28, 1922.

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In the Supreme Court of the United States

OCTOBER TERM, 1921.

THE UNITED STATES OF AMERICA, EX rel. John W. French, relator, *plaintiff in error*.

v.

JOHN W. WEEKS, SECRETARY OF WAR, defendant, *defendant in error*.

No. 724.

THE UNITED STATES OF AMERICA, EX rel. William F. Creary, relator, *plaintiff in error*,

v.

JOHN W. WEEKS, SECRETARY OF WAR, defendant, *defendant in error*.

No. 725.

BRIEF FOR THE SECRETARY OF WAR, DEFENDANT IN ERROR.

These causes have been advanced for argument because an authoritative interpretation of the requirements of the 1920 Army reorganization act is urgently needed by the War Department in its day-to-day work of administering that act.

STATEMENT OF THE CASE.

In the above-entitled actions the two relators were colonels of Infantry in the United States Army who, on the ground of unfitness, had been eliminated from the active list of the Army under the provisions of section 24b of the Army reorganization act of June 4, 1920 (41 Stat. 759, 773). Colonel French had been eliminated therefrom by being placed on the retired list; whereas Colonel Creary had been discharged. The present actions, instituted in the Supreme Court of the District of Columbia, were designed to obtain through mandamus restoration of these officers to their status before retirement and before discharge, respectively.

Little comment need be made upon the facts stated in the brief for plaintiffs in error.

That brief neglects to mention one very important fact. The relators, at the time of their elimination by the orders complained of, were serving in the grades to which restoration is sought by mandamus, in virtue of recess appointments. When the next session of the Senate came to an end March 4, 1921, no confirmations by the Senate and appointments by the President in virtue thereof had been had. Under the Constitution, therefore, there have been no offices since March 4, 1921, to which they could be restored.

In the following particulars, the facts stated by plaintiffs in error are misleading, rather than incorrect.

The records furnished to plaintiffs in error (Brief, pp. 6, 7) were those on which their provisional classifi-

cations had been based, as required by the statute (sentence 4, infra, p. 8). No contention can justly be made that relators had insufficient opportunity, through access to their records, to present cases in the courts of inquiry. Technical objection to the sufficiency of the records furnished was made in the petitions herein, but both of the lower courts have overruled the objection (Creary rec. pp. 27, 66) and no appropriate assignment of error has preserved the objection for consideration by this court. Further reference to any alleged defect in the furnishing of records seems, therefore, out of place and misleading.

The same comment applies equally to the references in the brief for plaintiffs in error to the fact that the record of the court of inquiry was not transmitted to the Judge Advocate General and to the assertion, in effect, that certain members of Colonel Creary's provisional classification board, final classification board, and "honest and faithful board" were prejudiced against him. (Brief, p. 9.)

The original defendant in both actions was Newton D. Baker, then Secretary of War, who, having been duly served with an order in the nature of process, in each case (French rec. p. 8; Creary rec. p. 6), filed answers. Demurrers by relators to the latter were argued together in February, 1921, and were sustained by the court March 12, 1921 (French rec. p. 22; Creary rec. p. 18). The present defendant in error who succeeded Mr. Baker as Secretary of War March 4, 1921, was not "brought into the case by petition or some other appropriate method" (*U. S. ex rel. Ber-*

nardin v. *Butterworth*, 169 U. S. 600, 605; *Irwin* v. *Webb*, Opinion, 20 March, 1922, by Chief Justice Taft), as might have been done under the act of February 8, 1899 (30 Stat. 822). Neither process nor notice or order in the nature of process was served upon him, as should have been done (*The Secretary* v. *U. S. ex rel. McGarrahan*, 9 Wall. 298, 313). He did not waive process (*New Mexico ex rel. Caledonian Coal Co.* v. *Baker*, 196 U. S. 432, 442), or authorize a general appearance (Weeks' affidavit; French rec. p. 31; Creary rec. pp. 31, 32). On the contrary, in advance of "pleading to the merits" (*Harkness* v. *Hyde*, 98 U. S. 476, 479), Mr. Weeks appeared specially and asked for the right as a new party defendant to interpose his own answer (*Waters* v. *Central Trust Co.*, 126 Fed. 469, 471; *Fulton* v. *Ramsey*, 67 W. Va. 321, 325, 326). The trial court refused to accord the right thus asserted (French rec. pp. 38, 39; Creary rec. p. 40), and entered final judgments for the relators against Mr. Weeks upon relators' demurrers to Mr Baker's answers.

No argument is addressed to this court, however, predicated upon the refusal of the trial court to give Mr. Weeks his day in court. For any question in respect thereof is entirely overshadowed by other questions in these cases, the solution of which questions is absolutely vital to the administration of section 24b of the reorganization act. For the same reason, no argument is addressed to this court to show that the relators, who have in effect conceded their unfitness to remain in the Army (de-

murrer to art. 3 of French answer, rec. p. 9; demurrer to art. 2 of Creary answer, rec. pp. 7, 3), are in no position to attack through mandamus the proceedings whereby they were eliminated therefrom for unfitness.

U. S. ex rel. Turner v. *Fisher*, 222 U. S. 204, 209.

Payne v. *U. S. ex rel. Olson*, 50 App. D. C. 119, 122; 269 Fed. 198, 201.

The questions presented to the lower courts and the decisions made thereon by those courts.

By its judgments, the trial court ordered peremptory writs of mandamus to issue against John W. Weeks, the present Secretary of War, commanding him (1) to vacate the military order of November 17, 1920, by which William F. Creary was discharged from the Army of the United States, and to restore him to the office and status of colonel of Infantry therein (Creary rec. pp. 49, 50), and (2) to vacate the military order of December 24, 1920, by which John W. French was retired from active service in the United States Army, and to restore him to the office and status of colonel of Infantry on the active list (French rec. p. 52).

Both officers were regarded by Mr. Justice McCoy in his decision upon the demurrers (49 Wash. L. R. 339, 344: French rec. pp. 28–30; Creary rec. pp. 20–27) as entitled to restoration to their status before November 17, and December 24, 1920, respectively, upon the ground that personal consideration and approval of the proceedings by the

President of the United States were essential to effective orders of elimination, and that consideration and approval by the Secretary of War, upon express delegation to him by the President of his function in this regard, were ineffective for any purpose. It was also held by Mr. Justice McCoy (Creary rec. pp. 28–30) that Colonel Creary was entitled to redress, in so far as he had been discharged, instead of being merely retired, on the ground that the military board (commonly styled the "honest and faithful board"), which is charged with determining the issue of discharge or retirement, had accorded him no hearing.

Numerous other contentions put forward by the relators (French rec., pp. 20, 21; Creary rec., pp. 15–17) as establishing the invalidity of the military elimination proceedings were overruled by the trial court.

Upon appeal to the Court of Appeals of the District of Columbia, the judgments awarding writs of mandamus were reversed on the ground that neither relator was entitled to a writ (277 Fed. 594). The contested delegation of authority to the Secretary of War to do all necessary presidential acts in connection with the elimination of officers under section 24b was upheld as valid and effective; and the question whether Colonel Creary was entitled to a hearing before the honest and faithful board was held not to be determinable in an action of mandamus since the President, who, by the act of the Secretary of War, which was effectively performed for the President and became in law his act, had

approved the conclusion and determination of the honest and faithful board, is not subject to coercion through mandamus by any court. In the language of the Court of Appeals, the contention "that relator was not given notice of the hearing before the honest and faithful board * * * may be laid aside, since, in our view, the case turns upon a question of jurisdiction." (Opinion, Creary rec. p. 66, reported 277 Fed. 594, 597.)

The questions for consideration by this court.

The only contentions among those put forward below by plaintiffs in error, which by their assignments of error they have saved for consideration by this court, are that the Court of Appeals erred in not accepting, and basing its decision upon the two propositions of law *supra* which were adopted by the trial court.

The elimination statute in controversy.

The text of section 24b of the Army reorganization act was quoted in the opinion of the Court of Appeals (Creary rec., pp. 65, 66). Nevertheless, for convenience of reference, it may be useful to quote it in this brief. This section, which has not been construed in any former case, consists of eleven sentences, of which the last three have no possible bearing upon the questions at any time raised in these cases. The first eight sentences are as follows:

> SEC. 24b. *Classification of officers.*—1. Immediately upon the passage of this act, and in September of 1921 and every year thereafter,

the President shall convene a board of not less than five general officers, which shall arrange all officers in two classes, namely: Class A consisting of officers who should be retained in the service, and class B, of officers who should not be retained in the service.

2. Until otherwise finally classified all officers shall be regarded as belonging to class A, and shall be promoted according to the provisions of this act to fill any vacancies which may occur prior to such final classification.

3. No officer shall be finally classified in class B until he shall have been given an opportunity to appear before a court of inquiry.

4. In such court of inquiry he shall be furnished with a full copy of the official records upon which the proposed classification is based and shall be given an opportunity to present testimony in his own behalf.

5. The record of such court of inquiry shall be forwarded to the final classification board for reconsideration of the case, and after such consideration, the finding of such classification board shall be final and not subject to further revision except upon the order of the President.

6. Whenever an officer is placed in class B, a board of not less than three officers shall be convened to determine whether such classification is due to his neglect, misconduct, or avoidable habits.

7. If the finding is affirmative, he shall be discharged from the Army; if negative, he shall be placed on the unlimited retired list with pay at the rate of 2½ per centum of his active pay multiplied by the number of complete years of commissioned service, or service

which under the provisions of this act is counted as its equivalent, unless his total commissioned service or equivalent service shall be less than ten years, in which case he shall be honorably discharged with one year's pay.

8. The maximum retired pay of an officer retired under the provisions of this section prior to January 1, 1924, shall be 75 per centum of his active pay, and of one retired on or after that date 60 per centum.

(Army reorganization act of June 4, 1920, 41 Stat. 759, 773.)

In dividing the text so as to make a separate paragraph of each sentence and in numbering each sentence, we have, of course, departed from the original, and have done so to facilitate references to the several parts of the statute.

It is clear from a perusal of the language of the act that it contemplates the following steps in the classification and in the retirement or discharge of an officer:

(1) *A preliminary classification board* (sentence 1, supra) examines the records of all officers of the Army and arranges them in two classes:

(A) Those who should be retained in the service; in a word, the fit.

(B) Those who should not be retained in the service; in a word, the unfit.

Should the officer in question be preliminarily classified in class B, then—

(2) If he requests it, *a court of inquiry* (sentences 3 and 4) affords him an opportunity to present his

case. The record of the court of inquiry is then forwarded to—

(3) *A final classification board* (sentence 5). If the latter board, after considering what has been proved and argued in the court of inquiry in conjunction with the officer's entire record, places him in class B, there shall then be assembled—

(4) *A board to determine the cause of classification* of the officer in class B (sentence 6), commonly referred to as the "honest and faithful board"; that is, a board to determine whether such classification was or was not due to his neglect, misconduct, or avoidable habits. This board, in discharging its functions, has, of course, the benefit of all previous proceedings, but it has never heretofore gone outside of them in reaching its conclusion. If it determines the foregoing question in the affirmative, the officer must be discharged from the Army; if in the negative, he must be placed on the retired list.

With reference to the fact that relators have brought their actions against the Secretary of War, the most significant feature to be noted upon a perusal of the statutory provisions, supra, is that they do not purport to impose any duty or responsibility upon the Secretary of War *virtute officii*,[1] who is not even mentioned in these provisions. Clearly the Secretary has no authority in the matter except in so far as, by the express or implied direction of the

[1] The phrase *virtute officii* is applied in this brief to acts done (rightfully or wrongfully) by an officer by reason of power or authority conferred *directly* upon the office held by him, by the Constitution or by a statute, and not by reason of power or authority conferred upon a superior officer and by the latter, entrusted or delegated to the officer in question.

President, given in conformity with R. S. 216, the Secretary acts for the President. With no showing, therefore, of any duty cast by law upon the Secretary and left by him unperformed, it was and is a mystery why relators have selected the Secretary of War as the party defendant in their actions of mandamus.

Another significant feature of these statutory provisions is that, aside from the duty of convening the preliminary classification board (sentence 1, supra), no duty is expressly cast upon the President, but, on the contrary, that in sentence 5, the statute purports to *diminish* what would otherwise be the primary responsibility of the President as Commander in Chief of the Army and as obligated to "take care that the laws be faithfully executed" (Constitution; sec. 2, clause 1, and sec. 3 of Art. II) by making the final classification board, primarily, the final arbiters as to the fitness or unfitness of Army officers to retain their offices. It is also to be noted that the language of sentence 5 does not support relators' idea (Brief, p. 13) that the statute expressly gives the President a power of revision. It merely empowers him to *order* a revision, which means a rehearing (by the final classification board).

Duane, Military Dictionary (1810), p. 600.
Wilhelm, Military Dictionary (1881), p. 487.
Farlow, Dic. of Mil. Terms (1918), p. 512.

Although the burdens to be borne by the presidential office are diminished by the last two lines of sentence 5, the power and authority of the President are not diminished, since his right to order a

revision of any officer's classification, whenever he sees fit, is recognized by necessary implication of its language.

The controversies between the parties litigant, as they appear in this court, are so far narrowed that the questions presented relate only to sentences 5 and 6, supra, and to the first three lines of sentence 7; the other portions of section 24b being relevant only as furnishing a context to aid in the work of interpretation.

In respect of these disputed sentences, the plaintiffs in error assert, and the defendant in error denies, that sentence 5, taken in conjunction with constitutional requirements and general legal principles, casts upon the President a personal, individual, nondelegable duty to study the proceedings relevant to the classification of every officer and to permit eliminations from the Army only after giving his approval of the proceedings consequent upon such personal consideration thereof. In the second place, the plaintiffs in error assert, and the defendant in error denies, that sentence 6 and the relevant part of sentence 7 obligates the honest and faithful board to accord to each officer a hearing before it, in addition to the hearing before the court of inquiry required by sentence 4 supra; the defendant in error also asserts that even were an officer unjustly deprived of a hearing before the honest and faithful board, his remedy is not by way of mandamus.

POINTS.

In urging that relators are not entitled to writs of mandamus and that the conclusion of the Court of Appeals is right, reliance is had primarily upon the grounds upon which the decision of that court was expresssly based. The following points in support of the same conclusion are also relied on:

1. The Army reorganization act requires no presidential act as a condition precedent to the elimination of an officer from the Army. Where the President does not see fit to act at all (personally or through his delegate or agent), the statute makes the findings of the final classification board and of the honest and faithful board final (expressly so, as to the former) upon all the issues incident to elimination. Therefore acceptance of relators' hypothesis of the invalidity of Secretary Baker's delegated authority would only involve denying the existence of any presidential act and would not invalidate the elimination of either officer, supported, as each elimination is, by the findings of both boards.

2. Upon the issue of the *cause* of classification (sentence 6 of the statute), Colonel Creary was not denied any hearing to which the statute entitled him, although he had no hearing in the presence of the honest and faithful board.

3. The offices to which restoration is sought were held in virtue of recess appointments and expired 4 March, 1921, at the end of the next session of the Senate; and it can not be assumed in an action of mandamus that (aside from the actual elimination

orders) they would have reverted to their previous offices held pursuant to nomination and confirmation.

4. Aside from other grounds, the removal of relators from their offices was valid as an exercise of presidential power, implied in his power of appointment to office or clearly granted in the 118th article of war.

I.

PERSONAL ACTION BY THE PRESIDENT IS NOT REQUIRED IN THE DOING OF ANY ACT INCIDENT TO THE RETIRING OR DISCHARGE OF AN OFFICER UNDER SECTION 24b.

This is true because (1) under section 24b, the President has a mere privilege or *option* of intervening, if he desires (sentence 5 of sec. 24b), the officers and boards whose *duty* it is to act being specified in the statute, viz, the classification boards and the honest and faithful board; and (2) were a presidential review or other presidential act required by section 24b, *personal* action by the President would not be necessary, for the reason (inter alia) that no judicial function is involved therein or in carrying into effect any of the purposes of the statute.

A.

PRINCIPLES TO BE APPLIED IN ASCERTAINING THE WILL OF CONGRESS AS TO WHETHER, IN THE ELIMINATION OF OFFICERS, ANY PRESIDENTIAL ACT IS REQUIRED AND, IF SO, WHETHER THE PRESIDENT MUST ACT PERSONALLY OR MAY ACT THROUGH THE SECRETARY OF WAR PURSUANT TO DELEGATED AUTHORITY.

In the administration of this officers' elimination statute, as of previous elimination statutes, the widest latitude, consistent with the statutory

language, should be accorded to those charged with responsibility for carrying the statute into effect. No presumption or intendment, therefore, should be indulged in favor of officers so as to retain them in office by adding to the safeguards and means of protection which Congress has expressly provided for them other safeguards and means of protection not expressly provided. This is true for two reasons: (1) The purpose of Congress in section 24b to save the country the expense of maintaining officers whose services do not measure up to the standard, which Congress has indisputably intrusted to the military authorities to fix, is one which should be promoted, not hampered, by the courts. The courts should not, therefore, interpose obstacles to eliminations ordered by the War Department, especially obstacles not known to former military practice, unless it is shown both *affirmatively and clearly* that the interposition of these obstacles is authorized by Congress. (2) An Army officer has no personal claim upon his office. He holds it, in theory, only because, and so long as it is advantageous to his country that he should do so.

These propositions are deemed too well settled to justify reference to more than a few of the available authorities.

1. In the war through which the world has recently passed, just as in the Civil War of 1861–1865, Army officers were desperately needed; so that almost every man who could become in any degree helpful to his country by undertaking the duties of an Army

officer, was called into the service as such. Manifestly, a situation of the opposite character arose when peace succeeded. The statutes passed after each of these wars for the elimination of surplus officers or of officers not measuring up to the new and higher peace-time standard of fitness are therefore to be construed by applying to such acts similar reasoning and similar principles. This is none the less true because the reorganization act of 1920 contemplates an annual weeding out, whereas the analogous act of July 15, 1870 (16 Stat. 315, 318), provided for a continuous process of weeding out and fixed a time limit for the completion of the process.

In *Street* v. *U. S.* (24 Ct. Cls. 230, 133 U. S. 299) it was held, in substance, that the elimination act of 1870, supra, must be given a liberal interpretation; not reading into it any procedural or other restrictions or requirements not plainly imposed by Congress and not treating the results as invalid, even where such requirements were wrongfully disregarded, unless the congressional purpose to make the requirements in question *conditions precedent* to valid eliminations were clearly expressed.

Lieutenant Street, who had been mustered out in virtue of the elimination act of 1870, supra, sued for pay on the theory that the order mustering him out was invalid. The statute required that officers, mustered out without being accorded a hearing on the issue of fitness, must have been placed on the supernumerary list by January 1, 1871; whereas Lieuten-

ant Street, who had no hearing, was so placed January 2, 1871.

In a preliminary statement of facts and principles, before proceeding to hold that noncompliance with the statutory requirement did not in that case vitiate the result, Mr. Justice Brewer, speaking for this court, said:

> "In 1869 and 1870, acts of Congress were passed looking to a reduction in the Army, and the order in question was made in pursuance of the last of these acts. The intent of Congress is obvious, and all proceedings had to carry such intent into effect should be *liberally construed*,[1] and not subjected to any such technical limitations as will thwart such obvious purpose."
>
> *Street* v. *U. S.*, 133 U. S. 299, 300.

Not only because of facilitating the attainment of the main congressional purpose in the present statute (the elimination of the unfit) should the court refrain from interposing obstacles not clearly sanctioned by Congress, but also because it must be assumed that Congress has not intended to burden the War Department with *new* limitations and restrictions, as compared with the methods previously in use, unless

[1] Quoted language is freely italicized throughout this brief in order to direct attention to the relation of ideas between the argument of the brief and the thought of the quoted authority. Each quoted passage is, therefore, to be read as if it were followed by the explanation: "Italics are those of the author of this brief." Phrases are also occasionally inserted in quoted passages throughout this brief, in order to make the meaning clear without having instant recourse to the full text of the original. Such inserted phrases are distinguished from the quoted language by not being within quotation marks, and this fact is further emphasized by using parentheses.

Congress has declared its will affirmatively and unequivocally to that effect.

The discharge and retirement of officers have, indeed, always been by presidential authority and orders of discharge or retirement have usually recited "By direction of the President." But it is a fact that is perfectly familiar to this court and to the community that the personal consideration of individual cases (other that those involving court-martial convictions) by the President has never been deemed essential to the validity of such orders and has seldom been had. The authority of the President is exercised in the true sense, when he authorizes the Secretary of War to order discharges and retirements in his name; and a discharge or retirement is by his "direction," in the true sense, when he directs that any who may have been selected for discharge or retirement by the Secretary of War, or who may thereafter be so selected, shall be discharged or retired as the case may be.

The well-established practice under which discharges and retirements are regularly accomplished without personal attention by the President, although in orders of discharge and of retirement recitals are used to the effect just stated, is doubtless a fact of which this court is entitled to take judicial notice. It is also sufficiently indicated by the record before this court (Exh. 1 and 2 to Creary ans., rec. p. 12; French petition, art. 7, rec. p. 4; Exh. 6 and 7 to French ans., rec. p. 20), for it can not be assumed that the highest officers of the Army and of the War

Department would order discharges and retirements expressly "by direction of the President," as they are shown to have done, in cases in which, according to the pleadings, there was no presidential consideration of the individual records; unless, indeed, the custom of the service sanctioned discharges and retirements without personal consideration by the President of individual cases and sanctioned the use of the phrase "by direction of the President" to denote compliance with the system of distribution of duties and responsibilities, which system had been directed by the President. The established practice should be weight by the courts (infra, p. 103).

2. Public offices are trusts for the benefit of the State or Nation, but the incumbents thereof have no contract right or property right to be continued therein. They have, therefore, no standing to object to arbitrary removal by the proper authority.

Butler v. *Pennsylvania*, 10 How. 402, 416.
Newton v. *Com. of Mahoning Co.*, 100 U. S. 548, 559, and cases cited therein.
Taylor v. *Beckham*, 178 U. S. 548, 577.
Wilson v. *North Carolina*, 169 U. S. 586.
Boyd v. *Nebraska*, 143 U. S. 135.

This proposition applies *a multo fortiori* to Army officers.

Blake v. *United States*, 103 U. S. 227, 232.
Crenshaw v. *United States*, 134 U. S. 99, 104, 105, 108.

whose tenure of office is "among the frailest known to the law."

Street v. *United States*, 24 Ct. Cls. 230, 247.

Officeholders are not protected, therefore, against arbitrary removal by the "due process" clause of the Constitution.

It is true that officers are entitled before elimination to "due process of law" in a general sense, but not in the constitutional sense. That is, they are entitled to the benefit of those proceedings only which the statute has actually created for them. It was in this sense only that Mr. Justice McKenna, speaking for this court in *Reaves* v. *Ainsworth* (219 U. S. 296, 299), said of the act of October 1, 1890 (26 Stat. 562), for the promotion or elimination of officers: "*This statute constitutes the law of the case.*"

Mr. Justice McKenna also said in the same case:

> "To be promoted or to be retired may be the right of an officer, the value to him of his commission, but greater even than that is the welfare of the country, and, it may be, even its safety, through the efficiency of the Army. And this was the motive of the act of October 1, 1890, and naturally its accomplishment was intrusted to the President. He executed the trust by constituting examining boards, defining their duty and *reserving to himself the ultimate review* of their proceedings and decision. This is the protection which the act of Congress gives to the rights conferred by it. If it had been the intention of Congress to give to an officer the right to raise issues and controversies with the board, * * * such intention would have been explicitly declared. The embarrassment of such a right to the service, indeed the detriment of it, may be imagined."
>
> *Reaves* v. *Ainsworth*, 219 U. S. 296, 306.

The promotion-or-retirement act of October 1, 1890, was manifestly *in pari materia* with section 24b of the reorganization act of June 4, 1920, although the latter statute differs from the former in not expressly intrusting its accomplishment to the President. The reasoning in *Reaves* v. *Ainsworth* is therefore important. According to its reasoning, the ultimate decision of whether an officer should be discharged under the 1890 act was reserved to the President because, and *only because* the President, by orders having the force of law, expressly reserved to himself the function of final review. The same reasoning applied to the present case would involve our saying that since Congress has not expressly cast upon the President the duty of final review, and he has not by competent order assumed it, the courts are not justified in charging him with that duty by implication. To do so would be for them to assume to "regulate the Army" (219 U. S. at 306).

B.

THE PRESENT OFFICERS' ELIMINATION STATUTE DOES NOT PURPORT TO REQUIRE, AND DOES NOT REQUIRE, ANY ACT UNDER PRESIDENTIAL AUTHORITY, BEYOND THE APPOINTMENT OF THE PROVISIONAL CLASSIFICATION BOARD.

1. In the elimination section of the reorganization act, there is no mention of or reference to the President in connection with the discharge or retirement of officers (sentence 7) or in any other part of the section, except in sentences 1 and 6. Sentence 1 requires the President to convene a preliminary

classification board annually. The pertinent part of sentence 6 is as follows:

> "The finding of said" [final] "classification board *shall be final* and not subject to further revision, except upon the order of the President."

Manifestly, in using this language, Congress is not *exacting* from the President or from any one exercising, by delegation, the President's authority any order on the subject of revision. It is merely *empowering* him to order a revision, if he shall think fit.

Probably the principal purpose in expressly making the board's classification final was to preclude urgent requests *addressed to the board* by officers, asking the board to reopen their cases and grant a "revision"; whereas the last seven quoted words were doubtless added to make it clear that the authority of the board, in respect of classification, were not intended to be superior to the President's.

Why is there a statutory declaration that the finding of the board shall be *final*, unless Congress contemplated that there would be cases not governed by the *exception* contained in the last seven words of the sentence quoted above, in which cases (not so governed) the finding of the board would actually be final? Incredible as it may seem, the trial court was persuaded to hold that the meaning of this simple language is the same as if its words had been:

> The finding of said classification board *shall never be final*. In every case, it shall be reviewed by the President, who may approve and adopt said finding; but if, upon such

review, he deems such finding to be erroneous or to be founded upon insufficient investigation, he may order further revision.

Had this been the wording of the statute (instead of the contrary wording actually used by Congress), it would have presented a question as to the right of delegation similar to that which, in some future case, may actually be presented with reference to sentence 1, to wit: Does the President discharge his duty under the statute by prescribing the method, and choosing the persons who are to perform the acts commanded by the statute and by assuming the responsibility for the result; in other words, may he delegate the doing of the particular acts required by individual cases?

But *the actual wording* of the statute *raises no such question*, since it does not purport to require the doing of any act, either by the President or for which he is made responsible by its terms, except only the act of convening a preliminary classification board. As to this act, no question is raised in the present case; for the petitions do not assert that the President delegated to some one else the duty of convening this board and there is no contention that he could not effectively have delegated this duty, if he had seen fit to do so.

Congress has *unambiguously* created a situation in which the finding of the final classification board, according to the congressional intent, is to be final *at least sometimes;* and it can not reasonably be supposed that Congress would describe such a finding as *final*, if such finding invariably required confirma-

tion or adoption, by the ratification or approval of the President, in order to give to such finding either finality or vitality or effect.

The relators persuaded the trial judge (Opin., Creary rec., p. 22) to infer from the pleadings that the President never permitted the findings of the board to become final, but always required a review thereof; and relators make the same contention here (Brief, p. 13, bottom). Were they right, that fact would not serve to vary the intent of Congress, which was to cast no duty of review upon the President, but only to recognize his right to intervene, by ordering a revision. But the trial judge and the relators are wrong. The pertinent allegations are:

> (Defendant) "received from the President then and there a general authority and direction that he, as Secretary of War, should in all such cases take such action in the name of the President and by his authority, by way of approval, revision, *or otherwise*, as from the circumstances shown by the record in each such case appeared to him to be right and proper." (Baker ans.: Creary rec., p. 9; French rec., p. 12.)

This was no more than saying that whatever the President would have had the right and the power to do, with reference to elimination proceedings, he desired to have the Secretary of War to do for him, and that in what the Secretary should do or should omit to do, he was to use his own judgment. What the Secretary was to do was by no means limited to approving, on the one hand, and ordering revisions,

on the other hand. For the word "otherwise" is broad enough to include any other course, with reference to any particular case of elimination, which course, to the Secretary of War, might appear to be right and proper; and, naturally, one of the courses which the Secretary was thus authorized to adopt, if he saw fit, was to refuse to review the proceeding.

The opportunities which a Secretary of War has to acquire information concerning the merits of Army officers are such that, aside from any formal proceedings for elimination, he may occasionally and, perhaps, often know that it would not serve any useful purpose for him to read the proceedings or to review them; in which event it would surely be "right and proper" under the plan of procedure directed by the President for the Secretary to refuse to review the finding of the classification board which, subject to one exception (that of the President's affirmative intervention in any particular case), the statute made final. Whether Secretary Baker, in his desire to avoid even the *possibility* of injustice, actually went beyond his duty and reviewed every case, the record before this court does not show, nor would it be material, legally, if such were the fact. All that the record shows is that the elimination proceedings were reviewed by the Secretary of War in the Creary and French cases.

2. But the trial judge seemed to regard the President as under a duty to examine the elimination proceedings *personally*, as incident to the option of

ordering a revision conferred upon him. The trial judge said:

> "If it is optional with the President to order a revision of the proceedings either directly or through the Secretary, certainly they must be called to his attention so that he may exercise his option, as *an option implies an opportunity.*" (Creary rec., p. 22.)

But the alleged fact that the record of the court of inquiry and of the final classification board was not transmitted to, or considered by the President personally (Creary petition, pp. 4, 5; French petition, p. 6), assuming such allegations to be true, would afford no indication that the President was denied an essential opportunity to exercise his statutory option. The grant of power to order a revision may imply a duty to take proper steps to secure suitable opportunity for exercising the power, but it was for the President to say what opportunity would be of value to him. There is no allegation indicating that the opportunity properly desired by the President was not actually enjoyed by him.

To hold that the President is without discretion to determine the sort of opportunity with which he must equip himself in order to exercise the powers and options which statutes confer upon him and to hold, as a matter of law, that in elimination cases, the only opportunity, consistent with his duties, is that which is afforded by *personally* reading the records of classification proceedings, would be analogous to holding that the conferring upon the President of the power to pardon Federal prisoners makes

it his duty to examine personally the records of the criminal trials of all the Federal prisoners.

In the absence of any allegation as to what system, other than that of his personally examining all records of elimination proceedings, the President caused to be established in order to enjoy due opportunity for the exercise of the statutory option conferred by section 24b, there is a *presumption* that the President caused a proper system to be established and caused it to be followed and carried out and that he and other public officers performed all the acts required by that system.

U. S. v. *Crusell*, 14 Wall. 1.
Ross v. *Stewart*, 227 U. S. 530, 535.
Erhardt v. *Ballin*, 150 Fed. 529, 531.
Wells Fargo & Co. v. *Johnson*, 205 Fed. 60, 77.
May v. *U. S.*, 236 Fed. 495, 499, 500.

Aside from any presumption, the facts, as they would have been proved, if necessary, by Mr. Baker (affidavit, par. 3: Creary rec., p. 42; French rec., p. 41) and as Mr. Weeks strove in vain to show by pleading (Weeks's proposed answers: Creary rec., pp. 36, 37; French rec., p. 36), were as follows, reasonable inferences from the proposed answers being (for the sake of brevity and clearness) stated as facts: The President decided, in effect, that it would be impossible for him to consider personally the merits of all the classification proceedings so as to decide whether in any of them, and in which of them, he would order a revision; that he could only undertake to consider

personally some of them (indeed, only a few of them); that if he were to attempt personally to separate the cases meriting his personal review and his personal decision upon the question of ordering a revision from the cases not meriting such personal review and decision, his labors would not be appreciably lightened, as compared with his reviewing personally all of the cases, and that this work of separation must, therefore, be done for him.

He accordingly directed the Secretary of War to do this work and to bring to the President's attention for personal consideration by him such cases as, in the Secretary's opinion, merited such personal consideration; and the President directed that in this work of separation of cases, the Secretary was to be influenced primarily by the importance of the cases, but also by any other circumstance which the Secretary regarded as entitled to influence. Under this system and under these directions, the President had what were for him the best facilities possible and the best opportunity possible (as a practical matter for a human being who lives only twenty-four hours per diem) to exercise the power conferred upon him by Congress to order revisions of classifications in class B. The Secretary of War performed his duty under this system and, in so doing, "concluded" "after due consideration" that relators' cases "did not, by reason of" their "importance or for any other reason, merit the personal attention and consideration of the President." (Weeks's answers, *supra*.)

3. Under section 24b, there are two steps incident to elimination, each involving a separate determination, to wit: (1) Determining whether an officer is fit

or unfit; i. e., classifying him in class A or class B, and (2) determining, as to each officer found unfit, the cause of unfitness; determining whether he must be discharged or is entitled to retirement.

The second determination is committed by statute to the honest and faithful board. Its determination is, no doubt, impliedly left subject to presidential control, but in the absence of action by or on behalf of the President, it seems entirely clear from the statutory language that the action of the honest and faithful board upon the issue of discharge or retirement is sufficient. The statutory language is to the effect the honest and faithful board shall "determine whether such classification" (in class B) "is due to his neglect, misconduct, or avoidable habits. If the finding is affirmative, he" (the officer so classified) "shall be discharged from the Army; if negative, he shall be placed on the unlimited retired list," etc. (sentences 6 and 7, supra, p. 8).

There is room to argue from this language that a review of the work of the honest and faithful board by or on behalf of the President is *permitted* by the statute; but there seems to be no room to argue that such review is *required* thereby, the President being not even mentioned in this connection.

C.

IF A PRESIDENTIAL REVIEW OF ANY OR ALL OF THE ELIMINATION PROCEEDINGS WAS REQUIRED, SUCH REVIEW WAS IN FACT HAD. THE COURT OF APPEALS WAS RIGHT IN SUSTAINING AS VALID PRESIDENT WILSON'S DELEGATION OF AUTHORITY TO SECRETARY BAKER.

With great respect to the two lower courts, both of which apparently regarded these cases as turning

primarily upon the delegability of the President's power to review and approve elimination proceedings, it is submitted that the elimination of the two relators was valid and effective, irrespective of the view that may be entertained upon this point. This is true because (as pointed out in heading "B," supra), the statute authorizes eliminations without any action whatever by or on behalf of the President; and because, if he omit to act, action by the final classification board and by the honest and faithful board are made sufficient.

Subject to objection by Colonel Creary, based on his having had no separate hearing before the honest and faithful board, relators in effect concede in this court that the two boards mentioned acted regularly and effectively in the elimination of both relators, assuming that these boards were competent to act without approval by presidential authority.

(a) The decisions below in respect of delegation of the President's authority.

In the multiplicity of the duties of the President, duties which statutes have cast upon him expressly as well as impliedly, his right to delegate these duties to others has been regularly recognized from very early times; *ex necessitate rei*, it could not have been otherwise. In no class of cases, so far as the industry of relators' counsel has discovered, has the rule of delegability of presidential duties been properly or successfully denied, except when the President exercises his confirmatory powers in respect of sentences of courts-martial (A. W. 65; 2

Stat. 367: now represented by A. W. 48; 41 Stat. 796). *Runkle* v. *U. S.*, 122 U. S. 543. The analogy between such action and other presidential action seems very remote, however, when it is borne in mind that in legal theory, the President, when he acts upon a court-martial case, becomes a judge, i. e., a member of the court-martial itself (infra, pp. 48, 50).

1. The Court of Appeals rightly regarded the rule in *Runkle* v. *U. S.* as inapplicable here on two fundamental grounds: (a) That the statutory language applicable to courts-martial is so specific as to indicate an intent that, in presidential cases, the President shall act personally and not through delegation; whereas the officers' elimination statute contains no language implying any such intent, and (b) that action upon court-martial records is judicial; whereas action upon elimination records is purely administrative.

The Court of Appeals pointed out (Opinion, Creary rec., p. 67) that in the Runkle case, "the statute expressly provided that no sentence of a general court-martial" (in presidential cases) "shall * * * be carried into execution until after the whole proceedings shall have been transmitted to the Secretary of War, to be laid before the President of the United States for his confirmation or disapproval." The express statutory reference to the Secretary of War was enough to indicate a legislative intent that he was to act as intermediary or adviser to the President, but was not to act as a substitute for the President's acting personally.

The Court of Appeals evidently entertained no doubt of the purely administrative character of the work of reviewing records of elimination proceedings. It announced its view in the following language (Creary, rec. pp. 67, 68):

> The proceedings are purely administrative, and do not partake in any sense of a judicial character. Relator has no property right in the office to which he seeks reinstatement (*Taylor and Marshall* v. *Beckham*, 178 U. S. 548); no contract right is involved (*Butler* v. *Pennsylvania*, 10 How. 402); and the office he held was revocable by the sovereignty at will (*Crenshaw* v. *United States*, 134 U. S. 99). In other words, the relator's rights are measured by the statute. *Reaves* v. *Ainsworth*, 219 U. S. 296; *Ex parte Garland*, 4 Wall. 333, 378.

2. The trial judge, after indulging, without explanation, the assumption that a review of elimination proceedings by presidential authority is essential to the validity of discharge or retirement, and without noticing the difference of language between the court-martial statute and the officers' elimination statute, held that such review is a judicial act for three reasons. (*a*) He construed the doctrine of this court in the Runkle case as being "that the act of reviewing was judicial in its character not solely because the proceeding was judicial, but because the act of reviewing the findings of others based on evidence is essentially a judicial act" (Creary rec., p. 23). (*b*) He deemed elimination proceedings, equally with court-martial trials, as judicial

because "in both a hearing is had and evidence is considered. In both, facts are found—in court-martial proceedings, guilt or innocence; in proceedings like the present, fitness or unfitness" (Creary rec. p. 24). (*c*) The trial judge thought that he found in section 5 of the same reorganization act an instance of expressly authorized delegation of presidential duties and he inferred that Congress did not intend to authorize other delegations of duties. One of the difficulties which preclude an acceptance of the third of his reasons is that the instance referred to is not one of delegation; for the statutory requirement that "the Chief of Staff * * * under the direction of the President or of the Secretary of War under the direction of the President, shall cause to be made * * * the necessary plans for recruiting, organizing, supplying," etc. (sec. 5; 41 Stat. 759, 764), is one that does not permit the President to act personally, if he choose, or to select any proper agent to act for him—as, for instance, the Secretary of War, the Assistant Secretary of War, or The Adjutant General—in the matter of causing necessary plans to be made. No presidential delegation is authorized by this section of the act because the primary responsibility of causing plans to be made is, in effect, declared not to be presidential at all. The only legislative purpose in mentioning the President is manifestly to make it clear *ex majore cautela* that the Chief of Staff, in the function specified, is not intended to be superior to the control of the President. The like caution was shown by

Congress in sentence 5 of section 24b (supra, p. 8); although less caution was shown in sentence 6 and the first three lines of sentence 7 of section 24b (supra, p. 8).

3. There appears to be equally slight support for the view of the trial judge that presidential action upon records of elimination proceedings is judicial, either because the President or his agent would be reviewing the findings of others (*Shoemaker* v. *U. S.*, infra), or because such findings were based upon hearings or upon a consideration of evidence (*Donahue* v. *County of Will*, 100 Ill. 94, 108).

It is true that in the case of *In re Guden* (171 N. Y. 529; 64 N. E. 451, 454), Judge O'Brien expressed the view that if a sheriff is entitled, before removal, to a hearing, the proceeding must be deemed a judicial inquiry. The six other judges, who with Judge O'Brien composed the court, *disagreed* with him, however; and in a similar case, that of *Kennedy* v. *Brady* (166 N. Y. 44; 59 N. E. 701), the entire court, including Judge O'Brien, agreed that a removal proceeding is at least *not* so *completely judicial* as to be reviewable by certiorari.

The basic principle that, in distinguishing between (1) political or executive acts involving discretion, (2) quasi-judicial acts of administrative officers and (3) quasi-legislative acts of administrative officers, the criterion is the nature of the final or effective act rather than the procedure followed, or the safeguards resorted to in order to prevent erroneous or mistaken action, such as hear-

ings, evidence, cross-examination of witnesses and preliminary recommendations or determinations with reviews thereof, was well stated by Judge Ray in *D., L. & W. Railroad* v. *Stevens*, 172 Fed. 595, 607, a case in which it was unsuccessfully contended that the action of the Public Service Commission of New York in regulating railway operation was quasi-judicial and therefore subject to correction on certiorari. Judge Ray said:

> "I am not prepared, as at present advised, to concur in any holding that a commission is a judicial or quasi-judicial body, or that it acts judicially and not legislatively, for the reason it hears evidence, considers, exercises its best judgment, and then decides what order it will make." *Delaware, L. & W. R. Co.* v. *Stevens*, 172 Fed. 595, 607.

The controlling principle was found by Judge Ray in a sentence of Mr. Justice Holmes that "the nature of the final act determines the nature of the previous inquiry." *Prentis* v. *Atlantic Coast Line*, 211 U. S. 210, 227.

In *Butterworth* v. *Hoe*, 112 U. S. 50, 56, 59, and in *Wedderburn* v. *Bliss*, 12 App. D. C. 485, 495, both cases involving successive reviews of determinations in the Patent Office, the quasi-judicial character of *all* of the determinations was recognized; as well determinations in the first instance as upon review.

Under the principle declared in the *Prentis* case, supra, it is manifest that the following proceedings, investigations, or determinations would not become judicial or quasi judicial, because of sworn evidence

being adduced before a body charged with ascertaining facts or because of interested persons being permitted to call witnesses and cross-examine others and enjoy privileges somewhat resembling those of a party litigant or because of the proceeding having reached the reviewing stage or that of final determination by the officer or body bearing the ultimate responsibility for the decision, either with or without the assistance of a recommendation or preliminary determination by inferior authority: (1) a proceeding to facilitate an intelligent congressional decision upon war or peace; (2) a proceeding to aid the President in deciding whether to recognize a foreign government, as, for instance, the Obregon Government in Mexico or the Soviet Government in Russia or whether to annex, under the act of Aug. 18, 1856 (11 Stat. 119, see *Jones* v. *U. S.*, 137 U. S. 202, 217), a guano island, which an interested American might claim to have discovered and to have found unoccupied by foreign nationals; or (3) a proceeding to aid the Secretary of War in deciding whether to deepen or improve a particular waterway (assuming that it were discretionary under the pertinent statute) or to erect a fort in proximity to a particular city.

The essential reasoning of the trial court would seem to be wholly invalidated, however, by the doctrine unanimously adopted by this court in *Shoemaker* v. *U. S.*, 147 U. S. 282, 301. In proceedings for the acquisition of land for Rock Creek Park, three appraisers appointed by the Supreme Court of the District, conformably with statute, took evi-

dence concerning the value of the land, heard arguments for the Government and for the owners of the land, and assessed the value thereof. The President of the United States was required by statute to review their valuation, his approval of the value being made a condition precedent to payment out of public funds. The contention of the landowners was that the function of the President was essentially judicial and that only a court could properly "review the evidence and proceedings before the appraisers * * * and decide whether the values fixed by them afforded just compensation." (147 U. S. at 293.) The lower court decided in effect, however, that (although, no doubt, the functions of the *appraisers* were judicial) the functions of the *President* in reviewing the proceedings and conclusions of the appraisers were not judicial, since the President had "no power to take the property in disregard of their assessment" (147 U. S. at 289). That the appraisers acted judicially and the President administratively presents no anomaly, since the appraisers' action (inter alia) was incident to compelling the landowners to take a just price; whereas the President's review was limited to a different feature of the appraisers' functions. This decision was affirmed. Mr. Justice Shiras, speaking for this court, said:

> "The duties prescribed to the President are * * * the approval of the price to be given for lands where an agreement has been had between the owners and the" (park) "commission, and, if an agreement is not made and a value is put upon lands by appraisers ap-

> pointed under the act, the decision whether such value is reasonable * * *. The approval of the value or price, whether fixed by agreement or appraisal, can not be said to be a judicial act. What the President decides is not whether the value is reasonable as respects the property owner, but reasonable as regards the United States."
>
> *Shoemaker* v. *U. S.*, 147 U. S. 282, 301.

It is clear, then, that neither a voluntarily conducted hearing upon evidence, nor one compulsorily conducted in virtue of a legislative or other mandate, gives to the proceeding, of itself, a judicial or quasi judicial character, and that the review of such proceeding, if conducted for the same purpose as the proceeding reviewed, partakes of the same character as that proceeding.

Contrary to the contentions of plaintiffs in error (Brief, p. 18), a ruling that Col. Creary was entitled to a hearing before the honest and faithful board would not amount to holding that its proceedings were judicial in character, even if any such ruling had been made. (See supra, pp. 34–36.)

(b) That presidential functions are delegable is the well-nigh universal rule. The Runkle decision turned upon exceptional statutory language, fundamentally unlike that in section 24b.

Statutes, like section 24b, are practical directions given by practical men concerning the working of an actual governmental machine with which the legislators are familiar; and they should be construed in the light of that fact. It may always be safely as-

sumed that the legislators did not intend to require the impossible. It may also be assumed that Congress is fully aware of the fact that it is physically impossible for the President personally to do all the acts that are required of him in statutes in which he is expressly named and in which he is required to act. The irresistible inference is that Congress has intended that the President, in such cases, should choose agents to act for him; that he should delegate to them the power and duty of doing the act required, either generally with reference to all acts of the nature in question, or with reference to particular cases or instances in which action is known to be required; and that the acts thus done by the President's agents should be add become, within the meaning of the statute, the President's acts.

The general principle is, therefore, that the President may delegate the doing of all acts required of him, even by statutes in which he is expressly named as the person to do the act; and that personal action by him is not required unless the statute makes it unmistakably clear that what is required is *personal* action by the President.

The only exception to the regular rule of delegability, which has been recognized, is one which relates to a statute wherein the legislative intent that personal action by the President is required was indicated by the express statutory mandate that the proceedings to be acted on by presidential authority should be transmitted to the Secretary of War and that he should lay them, or cause them to be laid,

before the President (A. W. 65, as it appears in 2 Stat. 359, 367; *Runkle* v. *U.S.*, 122 U.S. 543, 555). It would seem that the laying of the proceedings before the President described in that exceptionally worded statute could only mean laying them before him personally; and if so, that personal action by him was contemplated. The language of the present statute is of the opposite character, for it affords not the slightest indication that personal action by the President was contemplated by Congress as essential to elimination. On the contrary, the plain implication of the statute (sentence 5, supra, p. 8) is that, while the President is empowered to act, action by him is not essential.

It would seem, therefore, that by reason of this vital difference between the language of the sixty-fifth article of war, supra, and section 24b of the present Army reorganization act, *Runkle* v. *U. S.* is not helpful to plaintiffs in error as a precedent.

However, the language of the old 65th article of war, plain though it seems, was not enough, of itself, to induce this court in the Runkle case to deny to the President his sorely needed privilege of delegating his duties. This privilege was denied only because (to borrow the language of Chief Justice Waite):

> "The action required of the President is judicial in its character, not administrative. * * * The trial, finding, and sentence are the solemn acts of a court. * * * When the President, then, performs his duty of approving the sentence of a court-martial dismissing an officer, his act has all the solemnity and

significance of the judgment of a court of law."

Runkle v. *U. S.*, 122 U. S. 543, 557, 558.

The doctrine in the *Runkle case* has been subsequently applied only to presidential action upon court-martial sentences as, for instance, in the *Page, Fletcher, Ide,* and *Bishop cases.* (137 U. S. 673; 148 U. S. 84, 89; 150 U. S. 517; 197 U. S. 334, 342.)

(c) In cases in which the findings of the final classification board and of the honest and faithful board are reviewed, such review is not a "judicial" function in the sense in which judicial functions are said to be nondelegable.

1. If the statutory language of section 24b does not of itself make the *Runkle* doctrine unavailable to plaintiffs in error, the question is whether presidential action upon elimination proceedings conducted under section 24b is "judicial in character, not administrative," within the meaning of Chief Justice Waite's phrase in the *Runkle case.*

The word "judicial" is unfortunately ambiguous. (See *Moore* v. *W. J. Traction Co.*, 62 N. J. L. 386; 41 Atl. 946, 947, and definitions in 23 Cyc. 1614.) In one narrow and rather unusual sense, for instance, a Federal act is deemed "judicial" only when it involves an exercise of judicial power within the meaning of the Constitution (*Ex parte Vallandigham,* 1 Wall. 243, 253). And not even all the adjudications of this court involve an exercise of such judicial power.

Wallace v. *Adams,* 143 Fed. 716, 725.
Ex parte Moran, 144 Fed. 594, 598.

No effort, therefore, will be made to show what the word ought to mean with reference to some other problem than that of the delegation of presidential powers. Nor will any effort be made to show, in general, what statutory duties an executive officer, other than the President, may delegate. For it is clear that if Congress requires the doing of an act by (let us say) the Chief of the Air Service, the statutory words might properly be regarded as requiring personal action; whereas the same words in a statute requiring action by the President might properly be regarded as permitting delegation of the duty to perform the act.

Indeed, delegation of the President's powers to the head of the appropriate department is *presumed* in the absence of evidence to the contrary; whereas no one inferior in rank to the head of the department enjoys, in general or as a matter of course, the presumption of a delegation of the powers of his superior.

This distinction was recognized by Judge Rudkin in *Northern Pac. Ry.* v. *Mitchell*, an action in ejectment brought by the railway. Its title to the disputed lands depended upon whether its filing of a map had been anticipated by presidential action reserving such lands. Acts of the Indian inspector and of the Indian Commissioner and of General Howard in giving effect thereto by force were relied on as amounting to presidential action. Subsequent to the filing of the map, President Hayes ratified these acts and formally set aside these lands. Plaintiff's title was nevertheless held good. Judge Rudkin saying:

> "It is also well settled that the President may act through the heads of the different departments; and if the head of one of the executive departments acts, it will be presumed, in the absence of evidence to the contrary, that he acted" [through authority delegated to him] "by direction of the President. Wilcox *v.* Jackson, 13 Pet. 513; Scott *v.* Carew, 196 U. S. 100. But so far as I am advised, *no such power* has been *delegated to* other *subordinate officers* of the government, whether civil or military and" [there being no presumption of delegation] "the acts of such officers, without authorization from the President or from Congress, are ineffectual for any purpose * * *. Although the court will presume that the head of a department acts by direction of the President, in the absence of evidence to the contrary, this presumption does not extend down the line to all civil and military officers of the Government of whatever grade."
>
> *Northern Pac. Ry.* v. *Mitchell*, 208 Fed. 469, 472, 473.

2. In considering what acts of the President may be deemed "judicial in character," it may be advantageous to classify the acts and determinations of administrative officers with reference to their inherent nature before considering the context of the opinion in the *Runkle case* and other authorities on what presidential acts are properly regarded as judicial and on what functions are delegable.

It is suggested that the acts and determinations of executive officers are divisible into the following classes:

(1) Purely *ministerial acts* which involve neither judgment nor discretion. These acts, in a proper case, may be coerced by mandamus. They are not judicial in any sense.

(2) Acts and determinations of administrative officers that differ from the former *only* because they involve *judgment or discretion*. By an unfortunate use of language, these acts have been occasionally referred to as judicial. To call them administrative acts would not be entirely appropriate, since administrative acts are often spoken of as including purely ministerial acts (the previous class). To distinguish them from the latter, this court has sometimes referred to acts involving judgment or discretion as *political acts* or executive acts.

> *Marbury* v. *Madison*, 1 Cranch, 137, 165, 166.
> *Twenty Per Cent Cases*, 13 Wall. 568, 575.
> *Kendall* v. *United States*, 12 Pet. 522, 609.
> *Decatur* v. *Paulding*, 14 Pet. 496, 515.
> *Mississippi* v. *Johnson*, 4 Wall. 475, 499.

(3) Administrative determinations which award, or take away, asserted rights of liberty or of property (*Craig* v. *Leitensdorfer*, 123 U. S. 189, 205), in doing which, notice to the persons affected and a hearing are, in general, constitutionally essential (*Chicago, &c. Railway* v. *Minnesota*, 134 U. S. 418, 457). The hearings, however, are not adversary proceedings in any proper sense; there is no public prosecutor nor any representative of the public

charged with opposing the asserted private right. The only public officers concerned are those who are charged with the making of a just and proper decision. These determinations are conclusive against collateral attack (*Central Trust* v. *Central Trust*, 216 U. S. 251, 261); but, not being *res judicata*, they are subject to modification by the same, or by superior administrative authority, unless otherwise provided by statute.

Pearson v. *Williams*, 202 U. S. 281, 285.
Johnson v. *Payne*, 253 U. S. 209.
Boynton v. *Blaine*, 139 U. S. 306, 325.
Garfield v. *Turner*, 31 App. D. C. 332.

Determinations of this class are appropriately referred to as *quasi judicial*.

(4) Determinations which, in their fundamental or essential features, are identical with the decisions, judgments, or decrees of courts constitutionally exercising the judicial power of the United States. They are consequent upon an adversary proceeding, in which there are *actor*, *reus*, and *judex*. Determinations of this class, when expressed in their final form, are so formulated by, or by direction of, the deciding officer or body as to be adapted to be carried into execution; they are determinations affecting life, liberty, or property; they have the force of *res judicata;* and the officer or body making such determinations is supported by an executive agency whose duty it is unquestioningly to carry such decisions into execution, unless prevented by action in the nature of appeal or pardon. Acts or determinations of this sort are accurately described as *entirely judicial in character*.

Determinations by the Interstate Commerce Commission are, therefore, not to be deemed *entirely* judicial in character (fourth class, supra), although proceedings before that body are very formal and technical (*Humboldt S. S. Co.* v. *Interstate Commerce Com.*, 37 App. D. C. 266, 277; *Louis. & Nash. R. R.* v. *Finn*, 235 U. S. 601, 606); whereas determinations by the Interior Department's "court of Indian offenses," which are not in writing and are reached by most informal methods, may possibly lay claim to being entirely judicial in character (*United States* v. *Clapox*, 35 Fed. 575).

The acts involved in the Runkle case plainly belong to the last class, described as entirely judicial in character; and we contend that the doctrine of the Runkle case is *limited* to acts of this class.

The acts involved in the present mandamus litigations, since no rights of liberty or of property are at stake (supra, p. 19), belong to the second class, that of acts merely involving judgment and discretion. Not only may the President delegate authority to perform acts of this class, but he may also, as the judicial precedents show, delegate authority to perform acts of the third class, acts that are appropriately called quasi judicial.

To speak of a determination as "judicial" when it not only never has the effect of *res judicata* (as in class 4, supra), but does not determine any right of liberty or of property (as in class 3, supra) is far from appropriate. We have met with only one instance in which this use of the word "judicial," is found in the

opinions of this court, viz, in Justice Field's opinion in *Wisconsin Railroad* v. *Price County*, 133 U. S. 496, 511.

But that eminent jurist more than makes amends by his elucidation of what is "judicial," in the course of his opinion in *The Sinking Fund cases* (99 U. S. 700, 761). He says:

> Whenever an act undertakes to determine a question of right or obligation, or of property, as the foundation upon which it proceeds, such act is to that extent a judicial one.

3. In what sense, then, did Chief Justice Waite use the word "judicial" when he enunciated the doctrine in the *Runkle case?* We submit that the answer to this question is apparent from the context of his opinion. He says:

> "The heads of departments are his" [the President's] "authorized assistants in the performance of his *executive* duties, and their official acts, promulgated in the regular course of business, are presumptively his acts. * * * Here, however, the action required of the President is judicial in its character, *not administrative*. * * * He is himself to consider the proceedings" [of the court-martial] "laid before him and decide personally whether they ought to be carried into effect. Such a power he cannot delegate. His personal judgment is required, as much so as it would have been in passing on the case, if he had been one of the" [ordinary] "members of the court-martial itself."
>
> *Runkle* v. *U. S.*, 122 U. S. 543, 557.

Indeed, the President, when he acts upon court-martial records, is actually in legal intendment a member of the court

> *In re Brodie*, 128 Fed. 665, 668;
> *Mills* v. *Martin*, 19 Johns. 7, 30;
> *Carter* v. *McClaughry*, 183 U. S. 365, 385;
> 1912 Digest of the Judge Advocate General, p. 554 (pars. B and C);

although common usage accords with that of Chief Justice Waite in not referring to him as a member of the court.

When, in the foregoing extract, the Chief Justice refers to the action of the President as "not administrative" "in character," it is clear that he does not deem it even *partly* administrative, as it would be if it belonged to any other class of acts supra than the last, viz, that class of acts designated as *entirely* judicial in character. He is apparently guarding against the possibility that the doctrine, of which he was giving Major Runkle the benefit, might be erroneously extended to determinations of the quasi judicial class, determinations that are partly administrative in character (e. g., such as those mentioned supra, pp. 44–46, and infra, pp. 54–60). Of determinations of the *quasi judicial*, partly administrative class, Mr. Justice Brewer said in *Orchard* v. *Alexander* (157 U. S. 372, 379):

> The approval of the evidence offered [by the claimant to public lands] in respect to settlement and improvement is only quasi judicial. It is *as much an administrative as a judicial act*. There is no contest before the

> register and receiver. No one represents the Government. The action taken is purely ex parte. It is only one step in the procedure by which, through an executive department, the title to public land is obtained by an individual.

In an Army elimination proceeding, the Government's only representation is by those officers who cooperate in making the determination and whose functions are absolutely analogous to those of the Interior Department officers, involved in *Orchard* v. *Alexander, supra*. An Army officer whose elimination is being considered has, indeed, no right of liberty or of property at stake; whereas a claimant to public land who, pursuant to statutory invitation, has settled upon and improved public land has a property right at stake in the proceeding before the Interior Department, and an alien immigrant has a right of liberty at stake in a deportation proceeding before the Labor Department. Except for this distinction, however, these and many other administrative proceedings that might be mentioned are identical in their essential nature.

That Chief Justice Waite was considering proceedings that are *entirely* judicial in character in the Runkle case and not those that are partly administrative and partly judicial is made even clearer by succeeding parts of the opinion. He says:

> His judgment [the President's], when pronounced, must be his own judgment and not that of another. And this because he is the person, and the only person, to whom has

> been committed the important *judicial power of finally determining* upon an examination of the whole proceedings of a court-martial, whether an officer holding a commission in the Army of the United States shall be dismissed from service as *a punishment for an offence* with which he has been charged, and for which he has been tried.

The Chief Justice then quotes Attorney General Bates' description of the essential nature of a court martial inter alia as follows:

> "The trial, finding, and sentence are the solemn acts of a court organized and conducted under the authority of and according to the prescribed forms of law. It sits to pass upon the most sacred questions of human rights that are ever placed on trial in a court of justice * * *. And the act of the officer who reviews the proceedings of the court, whether he be the commander of the fleet or the President, and without whose approval the sentence can not be executed, is as much a part of this judgment, according to law, as is the trial or the sentence. When the President, then, performs this duty of approving the sentence of a court-martial dismissing an officer, his act has all the solemnity and significance of the judgment of a court of law."
>
> *Runkle* v. *U. S.*, 122 U. S. at 557, 558.

The opinion of Attorney General Bates, thus approved by Chief Justice Waite, was one holding that the decision of a court-martial ranks as *res judicata*. In advising the Secretary of the Navy, March 12,

1864 (11 Ops. Atty. Gen. 19), that upon approval of the conviction of a naval officer, the effect of the judgment could only be modified by resort to the pardoning power, the Attorney General also stated that if the President disapproved the sentence of conviction of a court-martial and thus, in effect, pronounced judgment of acquittal, the President would be without power, after promulgation of his formal decision, to revoke the same and to render the sentence of conviction effective by approving it.

A court-martial, with its prosecuting attorney and attorney for the accused, adjudicates upon a "contest," as that word was used by Mr. Justice Brewer in *Orchard* v. *Alexander* supra. It is a court of law to the fullest degree and in every sense, except only that, instead of exercising the judicial power of the United States under Article III of the Constitution, it is a "legislative court" like the Territorial courts (*McAllister* v. *United States*, 141 U. S. 174, 181). But the authority of courts-martial and other legislative courts is equal to, and coordinate with, that of the courts created under the "judicial power" provision of the Constitution (Art. III, sec. 1).

> *United States* v. *Maney*, 61 Fed. 140, 143.
> *Wales* v. *Whitney*, 114 U. S. 564, 570.

Judge Wallace, in announcing the decision of the U. S. Circuit Court in the case of *In re Davison*, 21 Fed. 618, 620, said:

> Courts-martial are lawful tribunals existing by the same authority [Congress] that this court is created by, have as plenary juris-

> diction over offenses by the law military as this court has over controversies committed to its cognizance and, within their special and more limited sphere, are entitled to as untrammeled an exercise of their powers.

In delivering the unanimous judgment of this court in *Grafton* v. *United States* (206 U. S. 333) Mr. Justice Harlan, after pointing out (p. 348) that the jurisdiction of courts-martial over crimes "is not exclusive, but only concurrent with that of the civil courts," declared (at p. 352):

> Congress has chosen in its discretion to confer upon general courts-martial authority to try an officer or soldier for any crime, not capital, committed by him in the territory in which he is serving. When that was done, the judgment of such military court was placed *on the same level* as the judgments of other tribunals when the inquiry arises whether an accused was, in virtue of that judgment, put in jeopardy of life or limb.

Among the numerous cases supporting the proposition that courts-martial are judicial tribunals in every sense are:

> *Carter* v. *Roberts*, 177 U. S. 496, 498.
> *Carter* v. *McClaughry*, 183 U. S. 365, 380, 383, 390.
> *Ex parte Reed*, 100 U. S. 13, 21, 23.
> *Swain* v. *United States*, 165 U. S. 553, 558.
> *Givens* v. *Zerbst*, 255 U. S. 11, 19.
> *U. S.* v. *McDonald*, 265 Fed. 754, 760.
> *United States* v. *Praeger*, 149 Fed. 474, 485.

The nondelegable acts of the President, described in the Runkle opinion as "judicial in character, not

administrative," are therefore confined to acts of the *entirely* judicial, or fourth class (supra, p. 45).

4. The sense in which Chief Justice Waite used the word "judicial" in the Runkle case accords with the best usage. Under this usage, action in administering and carrying into effect the elimination statute of June 4, 1920, is aptly described as political action or discretionary executive action (second class, supra), but not as either quasi judicial, or entirely judicial action. For instance, the acts of the elimination boards functioning under section 11 of the statute of July 15, 1870 (16 Stat. 315), acts which, in their essential nature, are identical with those under section 24b of the present statute, have been judicially declared to be acts neither of a judicial nor of a quasi judicial tribunal (*Sherburne* v. *United States*, 16 Ct. Cls. 491, 499).

An accurate and fairly complete statement of the various judicial and quasi judicial determinations which the administrative officers of the United States are empowered by law to make is found in section 309 of Prof. Chaplin's "Principles of the Federal Law." His enumeration of quasi judicial acts of administrative officers of the United States Government, intended, no doubt, to be complete, is found to include only cases in which some property right or right of liberty is at stake or affected by the administrative determination. The inference is unavoidable that Prof. Chaplin regards an administrative act or determination as judicial or quasi judicial, only when a right of liberty or of property is at stake.

This view has also been frequently expressed in judicial decisions.

The following test of what constitutes judicial (including, of course, quasi judicial) action by administrative officers and bodies has been adopted by the Supreme Court of Minnesota:

> To render the proceedings of special tribunals, commissioners, or municipal officers judicial in their nature, they must affect the *rights or property* of the citizens in a manner analogous to that in which they are affected by the proceedings of courts acting judicially. * * * Where proceedings are judicial, if no right of appeal is given, certiorari will lie, but the fact that no right of appeal is given has no bearing on the question whether the proceedings are judicial in their nature.
>
> *State ex rel. Grant* v. *Inverson*, 100 N. W. 91, 92, 92 Minn. 355, quoting
>
> *State ex rel. Hardy* v. *Clough*, 67 N. W. 202, 64 Minn. 378.

The same test has been applied in ascertaining the essential nature of an administrative determination recognizing or denying a pension claim; to wit, that the determination is a quasi-judicial act if, and only if, the pension claim represents a property right. Assuming the existence of a pension statute, a pension claim becomes a property right in respect of the period from and after the arising of the disability or the happening of any other contingency, upon which the right thereto is made to depend, and continuing thereafter while the same situation exists and while the statute granting the pension remains unrepealed.

> *Gibbs* v. *Minneapolis Fire D. Relief Assoc.*, 125 Minn. 174, Ann. Cas. 1915 C 749.

Kavanagh v. *Police Pension F. Com'rs*, 134 Cal. 50, 66 Pac. 36, 37.

Rudolph v. *U. S.*, 36 App. D. C. 379.

Pennie v. *Reis*, 132 U. S. 464, 471.

Thus in *Stevens* v. *Minneapolis Fire D. Relief Assoc.* (124 Minn. 381, 50 L. R. A., N. S., 1018, 1023), the court said:

> It is clear that in determining the question whether a member shall be dropped from the pension list and thereby deprived of the benefits conferred and vested thereby, the association acts in at least a quasi judicial capacity; *for the determination affects* the *vested legal rights* of the pensioner.

The same test was applied in *Baker* v. *Gooding County* (25 Idaho 506; 138 Pac. 342, 345) in considering whether the action of highway commissioners, when they assumed to raise money for highways by bonding, was judicial. The court pointed out, in effect, that the problem related to quasi judicial action rather than to judicial action, saying:

> When the term "judicial" is applied to the action of such boards, it is not to be received in the same sense usually applied to courts.

The court then continued by quoting and adopting the following language from *Robinson* v. *Sacramento:*

> "It is sufficient" (for their action to rank as quasi judicial) "if they are invested by the legislature with power to *decide on the property or rights of the citizen.*" (16 Cal. 208.)

In New Jersey, there is an interesting line of cases defining what is judicial (or rather quasi judicial),

in connection with the granting of writs of certiorari to review the acts and determinations of executive officers. In New Jersey, not only does the usual rule prevail that neither purely ministerial acts nor political acts are reviewable on certiorari, but it is established that, under the wording of the New Jersey constitution, the power of the Supreme Court to review on certiorari the judicial and quasi judicial acts of inferior special tribunals and of administrative officers and bodies cannot be impaired by legislative enactment (*McCullough* v. *Essex Circuit Court*, 59 N. J. L. 103, 34 Atl. 1072; *In re Roebling's Estate*, 108 Atl. 359), so that the statutory power of the governor (who in New Jersey is not amenable to control by the courts) to remove a public-utilities commissioner was apparently deemed constitutionally valid, only because the governor's act of removal was not judicial or quasi judicial (*McCran* v. *Gaul*, 112 Atl. 603, 606). In the line of cases referred to, the right to certiorari and the quasi judicial character of the act to be reviewed thereunder were made to depend upon whether or not such act affected private rights of liberty or of property or contract.

Moore v. *W. Jersey Traction Co.*, 62 N. J. L. 386; 41 Atl. 946, 948.

Sears v. *Mayor of Atlantic City*, 73 N. J. L. 710; 64 Atl. 1062, 1063: 72 N. J. L. 435; 60 Atl. 1093, 1094.

Erie R. R. v. *Paterson*, 79 N. J. L. 512; 76 Atl. 1065, 1066.

Amer. Malleables Co. v. *Bloomfield*, 83 N. J. L. 728; 85 Atl. 167, 170.

Borough of Verona v. *Freeholders*, 88 N. J. L. 55; 95 Atl. 730, 731.

In the case of *Amer. Malleables Co.* v. *Bloomfield* (supra), for instance, a resolution of the town council, which involved changing the level of a manufacturer's railway siding, was set aside on certiorari, Mr. Justice Voorhees saying:

> It interfered with private rights; and *therefore* was judicial in its character.

Other decisions recognizing the same test of what is judicial are:

> *People* v. *Oakland Board of Education*, 54 Cal. 375, 377.
>
> *Greenough* v. *School Com. of Pawtucket*, 27 R. I. 428; 62 Atl. 978.
>
> *Newell* v. *Franklin*, 30 R. I. 258, infra.
>
> *State ex rel. Milw. Med. College* v. *Chittenden*, 127 Wis. 468; 107 N. W. 500, 511, 512.
>
> *In re County Commissioners*, 22 Okl. 435; 98 Pac. 557, 560.
>
> *State ex rel. Atty. Gen.* v. *Hawkins*, 44 Ohio St. 98; 5 N. E. 228, 232.
>
> *Woodmont Ass'n* v. *Town of Milford*, 85 Conn. 517; 84 Atl. 307, 310.
>
> *Kalbfell* v. *Wood*, 193 Mo. 675; 92 S. W. 230, 233.

The same conception of what is judicial has been recognized in substance by this court. *Interstate Com. Commission* v. *Cincinnati, etc., Railway*, 167 U. S. 479, 499. *Hibben* v. *Smith*, 191 U. S. 310, 321, 322. The following statement, for instance, received its unanimous approval:

> "In the comparatively few cases in which such questions" [those involving the validity

> or the conclusiveness of administrative determinations] "have arisen, it has been distinctly recognized that administrative *orders, quasi judicial in character, are void if a hearing was denied;* if that granted was inadequate or manifestly unfair."
>
> *Interstate Commerce Commission* v. *L. & N. Railroad*, 227 U. S. 88, 91.

But all administrative orders that are void where hearings are denied are orders affecting rights of liberty or of property. This Court, therefore, said in substance in the passage just quoted that no administrative orders are quasi judicial, except those which involve rights of liberty or of property. That this was really the meaning of the Court is confirmed upon an examination of the precedents which it cited (227 U. S. at 91, 92) immediately after the passage quoted. The "administrative orders quasi judicial in character" to which these precedents relate are:

> Administrative orders excluding or deporting alleged foreigners from the United States (involving liberty):
>
> *Tang Tun* v. *Edsel*, 223 U. S. 673.
> *Chin Yow* v. *U. S.*, 208 U. S. 8.
> *Low Wah Suey* v. *Backus*, 225 U. S. 460.
> *Zakonite* v. *Wolf*, 226 U. S. 272.
>
> Administrative orders requiring railways to establish physical rail connections with each other or schedules of connecting trains (involving property rights):
>
> *U. S.* v. *B. & O. S. W. Ry.*, 226 U. S. 14.
> *A. Coast Line* v. *N. C. Com.*, 206 U. S. 1.
> *Wis. Railroad* v. *Jacobson*, 179 U. S. 287.
> *Oregon Railroad* v. *Fairchild*, 224 U. S. 510.

Administrative orders fixing freight rates (involving property rights):

S. Pacif. Co. v. *Interstate Com. Commission*, 219 U. S. 433.

Administrative orders regulating distribution of railway cars to shippers (involving property rights):

Int. Com. Commission v. *Ill. C. Railroad*, 215 U. S. 452.

Administrative determinations fixing the value of importations and therefore the amount of customs duties (involving property rights):

Muser v. *Magone*, 155 U. S. 240.

Other administrative determinations which have been described as of a judicial nature are decisions of the Land Office fixing the rights of private persons to public lands under the preemption, homestead, and other statutes:

Riverside Oil Co. v. *Hitchcock*, 190 U. S. 316, 324.

Bates & Guild v. *Payne*, 194 U. S. 106, 108.

On the other hand, the determination of whether American citizens who have discovered guano on an unclaimed island shall have the benefit of its being treated as American soil constitutes an exercise, under the act of August 18, 1856 (11 Stat. 119), of "a strictly executive power." (*Jones* v. *United States*, 137 U. S. 202, 217.)

Quasi judicial decisions of this nature were in one case referred to by Mr. Justice Matthews as the antitheses of ordinary executive or administrative

determinations which, without affecting property rights, involve the exercise of discretion. He said:

> "The language of the section of the Revised Statutes (§453) describes the duties of the Commissioner" [of the General Land Office,] "to be performed under the direction of the Secretary, as executive duties, while those which relate to the decision of *questions of private right* under the preemption laws, being *quasi judicial*, are made by §2273 expressly subject to an appeal.
>
> *Butterworth* v. *Hoe*, 112 U. S. 50, 56.

That acts and determinations of administrative officers do not become judicial in any degree merely because they involve judgment and discretion was ruled in:

> *Hammer* v. *Smith*, 11 Ariz. 420, infra, p. 62.
>
> *Newell* v. *Franklin*, 30 R. I. 258; 74 Atl. 1009, 1011.
>
> *Greenough* v. *School Com. of Pawtucket*, 27 R. I. 428; 62 Atl. 978.

The acts and determinations of a court of inquiry have been held by the Judge Advocate General of the Army not to be judicial in character. (J. A. G. 25052, Nov. 4, 1920.)

5. Under the authorities, supra, every act in effectuating the terms of the elimination section (24b) of the present Army reorganization statute is manifestly either purely ministerial or is political or executive (classes 1 and 2, supra, p. 44) and is neither entirely judicial nor quasi judicial (classes 3 and 4). Action under section 24b shares with quasi judicial action, it is true, the feature of being con-

clusive against collateral attack. But this is a feature common to all administrative action in which scope for the exercise of any discretion is permitted (*Keim* v. *United States*, 177 U. S. 290, 293; *Eberlein* v. *United States*, Opinion Nov. 7, 1921 by Mr. Justice Day).

In its essential nature, however, action under section 24b differs widely from judicial or quasi judicial action. The essential nature of the former consists in this: That it strives to promote the usefulness of the Army and the advantage and welfare of the Nation; but such action, in legal contemplation, is taken by the Nation without reference to the interest of individuals.

Reaves v. *Ainsworth*, 219 U. S. 296, 305.
Shoemaker v. *U. S.*, 147 U. S. 282, 301.
Sherburne v. *U. S.*, 16 Ct. Cls. 491, 499.
Street v. *U. S.*, 24 Ct. Cls. 230, 247, 248.

Relators' position, while appearing in proceedings in which their elimination was being passed on, was very similar to that of an author or publisher of a textbook which, after initial investigation and selection, has been in use for some time in the public schools, but which is being considered anew, with reference to its being eliminated or yielding to the textbook of some other author or publisher. Even though the former author or publisher were, by statute, given a hearing and the right to call his own witnesses and to cross-examine other witnesses before the school committee or the board of education, his position would bear no analogy to that of a party litigant whose legal rights are at

stake, for he would be merely cooperating in the public interest (*People* v. *Oakland Board of Education*, 54 Cal. 375, 377); and not the less so, in legal theory, because the legislature might have sought to promote the public good by taking advantage of the zeal that selfish interest inspires.

A somewhat similar situation arises upon a public auction conducted by the State, when, of several competing bidders, each claims to be "the best responsible bidder" and therefore entitled, under some statute, to be awarded the contract. Neither of them, however, resembles a party litigant or has any legal interest, in the nature of a property right, in the question to be determined by the representatives of the State. As was said in *Hammer* v. *Smith*, 11 Ariz. 420, 94 Pac. 1121 (and quoted in *Newell* v. *Franklin*, 30 R. I. 258), "The discretion and judgment exercised" (by the State's representatives) "in this matter are those of an agent seeking the best interest of his principal." "There is no issue, because there is but one party in interest—the public."

The Army authorities are in no sense trying the legal rights of an officer suggested for elimination under section 24b; they are merely subserving the interests of the Nation in the manner commanded by statute.

It is true that their action in promoting the efficiency of the Army through the retiring or discharge of an officer whose services are no longer needed, may *incidentally* diminish or terminate the pay to which he has been confidently looking forward. But

pay for prospective military services is not a property right (supra, p. 19); and neither the fixing of the amount of such prospective pay (*Smith* v. *Strother*, 68 Cal. 194, 8 Pac. 852; *Interstate Commerce Com.* v. *Cin., etc., Railway*, 167 U. S. 479, 499), nor the fixing of the duration of such prospective services (*In re County Commissioners*, 22 Okl. 435, 98 Pac. 557, 563) involves judicial or quasi judicial action.

An Army officer's position is, therefore, exactly that of which he is warned by the language of his commission, which reads:

> This commission to continue in force during the pleasure of the President of the United States for the time being.

(d) **Under the decided cases, acts essentially analogous to that of a presidential review of the finding of the final classification board (were such review required) are delegable.**

The judicial authorities support overwhelmingly the proposition that the President, by general or by special authorization, may delegate to the head of an executive department the performance (1) of acts that are ministerial; (2) of acts that are political or executive, involving discretion; and even (3) of acts that are quasi judicial, but not entirely judicial in character. And this is true, even in performing acts which, by statutes unlike the one now under consideration, are *expressly* required *to be performed by the President*.

Prof. Wyman (Administrative Law, sec. 63) regards the delegation of powers as the *foundation*

upon which any adequate theory of centralized administration must be built (p. 204).

The rule in the *Runkle case*, he regards as an exception to the general principle. Indeed, the authorized discharge by administrative officers of *entirely* judicial functions, such as trying and sentencing men to death or imprisonment for offenses, could not be other than exceptional.

Prof. Wyman regards the rule in *Williams* v. *United States* (1 How. 290, *infra*), and in *Hisey* v. *Peters* (1896 Pat. Dec. 22, *infra*), as the one of general application. Both cases involved delegation of power to make a determination involving discretion, the former belonging to the second class *supra* (p. 44), and the latter to the third or quasi judicial class. In the Williams case (as in the present case), the particular determination whose validity was contested had not been made by the President, although the statute (3 Stat. 723) required "the *especial direction* of the President." He had, however, made a general anticipatory delegation to the appropriate department head of all his powers derived from the statute involved.

It is, no doubt, true that if the delegation of the President's duties were to be governed by the same rule as that which governs the delegation by a private agent of the duties of the latter, only acts of a purely ministerial nature could be delegated. And so, indeed, it was argued by Mr. Bradley in *Williams* v. *U. S.* (1 How. at 291, 293), but this court unanimously adopted the contrary rule. To

Mr. Bradley's argument based on the "general rule * * * that discretionary powers can not be delegated," Attorney General Legaré replied (1 How. at 292):

> If the President could not delegate this power, he could do little else but look at marshal's accounts. But this court have recognized the authority to delegate. *Wilcox* v. *Jackson*, 13 Pet., 498; 10 Id., 291; 1 Id., 296.

In upholding the President's right of delegation Mr. Justice Daniel said:

> While it has been doubtless the object of Congress to * * * limit, as far as was proper, the discretion of subordinate agents over the public money, it never can be reasonable to ascribe to them a conduct which must defeat every beneficial end they could have in view and render the Government an absolutely *impracticable machine*. The President's duty in general requires his superintendence of the administration; yet this duty *cannot* require of him to *become the administrative officer of every department and bureau* or to perform in person the numerous details incident to services which, nevertheless, he is, in a correct sense, by the Constitution and laws required and expected to perform. This can not be, 1st, because, if it were practicable, it would be to absorb the duties and responsibilities of the various departments of the government in the personal action of the one chief executive officer. It cannot be, for the stronger reason, that it is impracticable—nay, impossible.
>
> *Williams* v. *U. S.*, 1 How. 290, 296.

The gist of the *Williams* decision was thus summarized by Mr. Justice Curtis in a later case:

> The Supreme Court * * * held that *general instructions by the President* to the Secretary of the Treasury *to make such advances* to the marshals of the United States *as the Secretary should deem proper*, and the act of the Secretary in making the advance *brought the case under this law.*
>
> *United States* v. *Cutter*, 2 Curt. 617.

In another case involving the President's right to delegate the powers conferred upon him by the same statute, which required his "especial direction," Mr. Justice Grier said:

> The Secretary of the Navy represents the President and exercises his power on the subjects confided to his department.
>
> *United States* v. *Jones*, 18 How. 92, 95.

The other case, regarded by Prof. Wyman as illustrative of the fundamental principle involved, is that of *Hisey* v. *Peters* (1896, Pat. Dec. 22), a case in which the right of an inventor to the benefit of a patent under the statutes was at stake—clearly a property right. The examiner decided adversely to Hisey, the inventor, on the ground of interference. Hisey appealed to the Commissioner of Patents, who delegated to the Assistant Commissioner the determination of the appeal, although the statute expressly gave Hisey the right to "appeal to the Commissioner *in person*" (R. S. 4910; Comp. St. 9455). Commissioner Seymour refused to treat as void the determination so made, saying, sub-

stantially in the language of this court in *Parish* v. *United States*, 100 U. S. 500, 504:

> It would be a singular doctrine and subversive of the purposes for which these offices of assistants have been created, if their acts were to be held of no force until ratified by the head. It is to relieve the overburdened principal of performance in person of a part of his duties that this office is established. If no virtue attaches to the acts of this assistant until approved by the head, any inferior clerk would answer the purpose.
>
> Wyman, Administrative Law, p. 208.

In passing upon precisely the same question of delegating patent appeals, Chief Justice Alvey said:

> The hearing and deciding appeals is a duty pertaining to the office of the Commissioner of Patents and may, therefore, be assigned to be performed by the assistant commissioner. It is urged in argument that such an assignment to duty is a *delegation of judicial power* that belongs to and can only be performed by the commissioner in person. But we are not of that opinion.
>
> *Stapleton* v. *Duell*, 17 App. D. C. 575, 583.

The court did *not* uphold the right of the commissioner to delegate his quasi judicial functions *to any subordinate* whom he might choose, but only to the assistant commissioner, who by statute was authorized to "perform such duties pertaining to the office of the Commissioner of Patents as may be assigned to him by the commissioner." (R. S. 476 as amended by act of July 11, 1890; Comp. St. 736.)

The President enjoys an entirely *analogous statutory power to delegate his functions to the Secretary of War*, who is expressly authorized to "perform such duties as shall * * * be intrusted to him by the President relative to * * * the military forces * * * or to other matters respecting military affairs" and to "conduct the business of the department in such manner as the President shall direct." (R. S. 216; Comp. St. 318.)

As a matter of ordinary usage of words, the Secretary of War is not spoken of as the President's assistant or the Assistant President for military affairs, but such is, in truth, his status. He and, in general, "the heads of departments are his" [the President's] "authorized assistants in the performance of his executive duties" (*Runkle* v. *U. S.*, 122 U. S. 543, 557). And it is usual for Congress to provide expressly that the heads of departments shall perform such duties, of the appropriate nature, as may be assigned to them by the President; for instance, in R. S. 202 as to the Secretary of State, and in R. S. 248 as to the Secretary of the Treasury. By an extension of this principle, the N. Y. Court of Appeals has described the sheriff as the governor's assistant.

In re Guden, 171 N. Y. 529; 64 N. E. 451.

The principle of the Stapleton case was fully recognized and applied in *John Shillito Co.* v. *M'Clung* (51 Fed. 868, 871). There, the question presented was as to the effectiveness of a decision made by the Assistant Secretary of the Treasury, pursuant to delegated authority, upon a statutory appeal

taken by Messrs. Shillito, importers, from an assessment of customs duties made by the collector of customs. Shillito insisted, although unsuccessfully, that this decision was void because the statute (R. S. 2931) expressly required a decision by the Secretary. The Assistant Secretary's authority to to discharge *all* of the functions of the Secretary, like that of practically all other statutory assistants, designated as such by statute, is not extended by express statute (R. S. 177) beyond cases in which the Secretary is absent or sick. That the Secretary gave no personal consideration to the case was conceded by demurrer.

In the opinion, which was concurred in by the present Chief Justice of this court, Mr. Justice Jackson, afterwards a member of this court, referred to R. S. 245, 161, 179, 177, and 236, the first of which sections (like R. S. 216 as to the Secretary of War) requires assistant secretaries of the Treasury to "perform such other duties . . . as may be prescribed by the Secretary" and then said:

> "It admits of no question that under the foregoing provisions *the Secretary of the Treasury could have assigned* to the assistant secretary or secretaries of the Treasury Department *the duty of deciding appeals* from assessments made by collectors of customs duties * * *. The reply does not negative the fact that the assistant secretary was not assigned by the Secretary of the Treasury to the performance of the duty of deciding the appeal."
>
> *John Shillito Co.* v. *M'Clung*, 51 Fed. 868, 871, 872.

Mr. Justice Jackson then quoted from *Parish* v. *United States*, 100 U. S. 500, 504, the passage relied on by Commissioner Seymour supra and based his decision upon the presumed delegation of the Secretary's authority.

It is manifest that the distinguished jurists who decided the *Hisey case* in 1895, the *Stapleton case* in 1901, and the *Shillito case* in 1892, respectively, understood the doctrine in the *Runkle case*, which had been decided in 1887, as applying only to the delegation of functions *entirely judicial* in character and as not forbidding the delegation of *quasi judicial* functions. The same conception of the Runkle doctrine was evidently shared by all the justices of this court in 1910, when they made their decision in *United States* v. *Chicago, M. & St. P. Railway* (218 U. S. 233, 243); for the opinion of the court does not purport to overrule, and does not even cite, the *Runkle case*.

This action against the railway was one which sought an adjudication that 4,100 acres of land in Iowa, to which the railway in 1880 had obtained a patent, were not legally its property. Its right to the lands depended upon their not having previously been reserved from the public domain for aiding internal improvements or otherwise (act of May 12, 1864; 13 Stat. 72). By the (so-called swamp lands) act of September 28, 1850 (9 Stat. 519), all public lands that were unfit for cultivation, on account of being swamp or overflowed lands, were granted to the several States wherein they were

located, and the Secretary of the Interior was directed to identify such lands by making out a list or plat of them. Certain counties of Iowa, which had succeeded to the rights of that State, selected the lands in suit as swamp lands prior to 1864.

The language of section 2 of the 1850 swamp lands act (now R. S. 2480), requiring the Secretary of the Interior to make "accurate lists and plats" of such swamp lands, has been frequently construed as conferring upon the Secretary of the Interior power to decide conclusively whether, for the purpose of disposing of the lands pursuant to the direction of the statute, any particular lands were swamp lands or not and, of course, to pass upon the character of lands claimed or selected under that act.

French v. *Fyan*, 93 U. S. 169, 171.
Heath v. *Wallace*, 138 U. S. 573, 585.
Chandler v. *Calumet Mining Co.*, 149 U. S. 79, 91, 92.
Wright v. *Roseberry*, 121 U. S. 488, 509.
Mich. Land Co. v. *Rust*, 168 U. S. 589, 592.
Warner v. *Valley Stock Co.*, 9 App. D. C. 187.
Brown v. *Bliss*, 13 App. D. C. 279.
Cramer v. *Keller*, 98 Mo. 279; 11 S. W. 734.

By the act of March 5, 1872 (17 Stat. 37), Congress required the Commissioner of the General Land Office to examine the selections already made in Iowa "and allow or disallow said selections." This was, however, not a new function of the commissioner. Before 1872, it had been a part of his regular duties, assigned to him by the Secretary of the Interior, to investigate and hold hearings upon the

character of lands alleged to be swamp lands and to make findings in respect thereof (*McCormick* v. *Hayes*, 159 U. S. 332, 337, involving also lands in Iowa).

These nonstatutory determinations of the commissioner were, of course, subject to modification by the Secretary, if he saw fit to intervene; the theoretical responsibility for the decision of the Interior Department being always that of the Secretary, a responsibility which the 1850 swamp lands act cast upon him. As repeals and amendments by implication are not favored (*Henrietta Mining Co.* v. *Gardner*, 173 U. S. 123, 128), the effect of the 1872 act was doubtless to work no change in the 1850 act as to whose decision should conclude the rights of the parties, but only to require hearings and an *advisory* determination by the commissioner. In any event, by section 2480 of the act of June 22, 1874 (R. S. 2480; 18 Stat. at L., part 1, p. 456), Congress reenacted the *identical language* of the 1850 act, in so far as it had been, and has been, held effective by the courts to empower and direct the *Secretary* to make for the Government its binding decision as to whether lands are swamp lands or not. The 1872 act, if inconsistent with the 1850 act, was necessarily inconsistent with the 1874 act and, to the extent of the inconsistency, it was superseded by the 1874 act.

In 1876, the commissioner passed upon the claims of the Iowa counties and determined that the lands were not in fact swamp lands and could not properly be included in any list of the lands falling within the scope of the swamp lands act of 1850.

This determination was regarded by the railway as conclusive in favor of the effectiveness of its patent; deeming it supported by a valid delegation of power to the commissioner, despite the contrary contention, based on want of a *personal* determination by the Secretary of the Interior.

The determination made by the commissioner denied to the Iowa counties property rights asserted by them and was plainly *quasi judicial* (*Ness* v. *Fisher*, 223 U. S. 683, headnote 1; *United States* v. *Minor*, 114 U. S. 233, 243). Their legitimate rights were thus stated:

> "By the act of 1850, Congress granted *in praesenti* to the State only swamp and overflowed lands within its limits, and the State legally * * * passed its interest in such lands to the counties in which they were situated." (218 U. S. at 243.)

Nevertheless, this court held unanimously that the powers of the Secretary under the swamp lands act were enjoyed by the commissioner (through presumed delegation of such powers). Mr. Justice Harlan said:

> "In determining this case, it must not be overlooked that the act of Congress *confers upon the Secretary* of the Interior and upon him *alone*, the power to identify particular lands as swamp and overflowed lands embraced by the act of 1850." (218 U. S. at 242.)

Whether Mr. Justice Harlan regarded that power as possessed by the Secretary continuously from 1850 to 1876 when it was exercised, or whether he regarded

it as interrupted March 5, 1872, and restored June 22, 1874, to the Secretary, does not appear; nor is it of any moment.

The fact that Mr. Justice Harlan regarded his decision as *turning upon the right to delegate* the making of a determination as to whether the lands were swamp lands, plainly appears from his following the sentence which asserts that the Secretary *alone* has power to make such determination, with a sentence in which he approves and relies on *French* v. *Fyan* (93 U. S. 169, 171) and *Ehrhardt* v. *Hogaboom* (115 U. S. 67, 68). These were cases in which the 1850 swamp lands act, although it names only the Secretary of the Interior, is construed as constituting the *Interior Department* a tribunal for the determination of the character of the lands in question. In other words, this determination, if made by the Secretary's proper subordinate, is to be deemed a compliance with the statute, although not made personally by the Secretary.

After adverting to the *notice to all parties concerned*, which the commissioner had caused to be given and to the fact that the commissioner had actually decided, and decided adversely the claims of Iowa and of its counties, Mr. Justice Harlan continued:

> "That decision" [of the commissioner] "was in contemplation of law one by the Secretary of the Interior, who, by the original act of 1850, was directed to make out accurate lists or plats of the lands described by that act as swamp or overflowed lands. *Wilcox* v. *Jackson*, 13 Pet. 498; *Wolsey* v. *Chapman*, 101 U. S. 755, 768."

United States v. *Chic., M. & St. P. Railway*, 218 U. S. 233, 243.

As the commissioner's determination was not made in the period between March 5, 1872, and June 22, 1874, no allusion to the act of 1872 was essential to the legal reasoning of Mr. Justice Harlan. The allusion made by him on page 243 of the report was doubtless due to the fact that the parties had *stipulated* that the hearings before the commissioner were had pursuant to the act of March 5, 1872 (Stip., art. 8; printed transcript in the swamp act case, fol. 41). The allusion may also imply that the judge regarded that part of the act of 1872 which required hearings and a (provisional) determination by the commissioner and was therefore *consistent* with R. S. 2480, as remaining in force after June 22, 1874.

But Mr. Justice Harlan was not invited to consider any contention that the commissioner *virtute officii* had power to make the quasi judicial determination which, by delegation of the Secretary's power, he in fact made. No such proposition was put forward by either counsel in the case or by the District Court or the Circuit Court of Appeals (*U. S.* v. *Chic. M. & St. P. Ry.*, 148 Fed. 884, 891; 160 Fed. 818, 820). All of them must have realized that, if the act of 1872 could be viewed as clothing the commissioner with quasi judicial functions, it had been repealed, to that extent, by the act of June 22, 1874.

Throughout this litigation, the railway counsel never contended that the commissioner's 1876 decision in favor of the railway was binding, inde-

pendently of authority delegated by the Secretary, but expressly conceded the contrary.

Mr. Vroman's brief in this court pp. 9, 10.

Mr. Justice Harlan, who *participated in* the decision in the Runkle case, could not have overlooked it, when he came to prepare his opinion in the swamp land case, *supra*. Manifestly, he regarded it as not impairing the correctness of the views expressed in *French* v. *Fyan* and *Ehrhardt* v. *Hogaboom; a fortiori* as not impairing the rulings in *Wilcox* v. *Jackson* and *Wolsey* v. *Chapman*. For he expressly relied on these four cases as precedents. Quasi-judicial acts were involved in the two former cases and only political, or discretionary acts, in the two latter cases. In all four cases, the acts were deemed delegable by each of the several officials required by statute to perform them and delegable to his principal, appropriate subordinate.

Indeed, the decision in the Runkle case did not involve the enunciation of any new principle not fully recognized and applied by this court before that time. This will be manifest, if a comparison is made between its decisions on the subject of the delegation of the President's powers made before, and its decisions made after 1887, when the Runkle case was decided.

Attention is invited to the following:

Cases decided before 1887.

Marbury v. *Madison*, 1 Cranch. 137, 166.
Parker v. *United States*, 1 Pet. 293, 297.
Wilcox v. *Jackson*, 13 Pet. 498, 513.
Williams v. *U. S.*, 1 How. 290, 296, 297.

United States v. *Freeman*, 3 How. 556, 566.
United States v. *Jones*, 18 How. 92, 95.
French v. *Fyan*, 93 U. S. 169, 171.
Parish v. *United States*, 100 U. S. 500, 504.
Wolsey v. *Chapman*, 101 U. S. 755, 769, 770.
Ehrhardt v. *Hogaboom*, 115 U. S. 67, 68.

Cases decided after 1887.

Jones v. *United States*, 137 U. S. 202, 217.
Wood v. *Beach*, 156 U. S. 548, 550.
United States v. *Chic., M. & St. P. Railway*, 218 U. S. 233, 242, 243.
United States v. *Morrison*, 240 U. S. 192, 212.
Chic., M. & St. P. Railway v. *United States*, 244 U. S. 351, 356, 357.
N. Pacif. Railway v. *Wismer*, 246 U. S. 283, 287, 288.
Norris v. *United States*, decided November 7, 1921; Opinion by Mr. Justice Day.

In the case last cited, the power of removal of Federal employees was held by this court to be delegable and the following language was used:

> "The objection urged upon our attention is that the order was made by an Assistant Secretary. We have no doubt of the authority of the Assistant Secretary of the Treasury to take this action. Section 245 of the Revised Statutes provides: 'The Assistant Secretaries of the Treasury shall * * * perform such other duties in the office of the Secretary of the Treasury as may be prescribed by the Secretary or by law'. * * * There is nothing in the record to show that the action of the Assistant Secretary did not have the full sanction and approval of the Secretary. Under such circumstances, the act of the

> Assistant Secretary must be presumed to be within the scope of the authority which the Secretary conferred upon his Assistant. *McCollum* v. *United States*, 17 Ct. Cls. 92."

In like manner, President Wilson conferred (although expressly) upon his Assistant, Mr. Baker (*Runkle* v. *U. S.* 122 U. S. 543, 557) the authority disputed by plaintiffs in error. R. S. 216 bears the same relation to the present question that R. S. 245 bore to that decided by this court in the Norris case (see supra p. 68).

In all of these cases, both those decided before, and those decided after 1887, this court considered and upheld administrative determinations, involving judgment and discretion (some of them quasi judicial in character), and made pursuant to *delegated authority;* and the court has shown no tendency after 1887 to narrow, in these cases, the doctrine which it applied before that year.

The simple fact is that in the Runkle case, the court regarded the President as ceasing, for the time being, to act as the Executive and as being transformed into a special and highly important part of a military court.

So far back as in *Marbury* v. *Madison* (1 Cranch. 137, 166), decided in 1803, Chief Justice Marshall said:

> The President is invested with certain important political powers, in the exercise of which he is to use his own discretion * * *. To aid him in the performance of these duties, he is authorized to appoint certain officers,

> who act by his authority, and in conformity with his orders. In such cases, *their acts are his acts* * * *. Where *the heads of the departments* are the political or confidential agents of the Executive, merely to execute the will of the President or *rather* to *act in cases in which the Executive possess a* constitutional or legal *discretion*, * * * their acts are only politically examinable.

What Chief Justice Marshall had in mind seems clearly to have been a general, anticipatory delegation of matters of a particular nature to the heads of departments. The same thought was afterwards expressed by Mr. Justice Duval as follows:

> The President * * * may issue the order himself, or it may be done by the Secretary of War, with his approbation. The Secretary of War, as the legitimate organ of the President, under a *general authority* from him, may exercise the power, and make the allowance to officers having a separate command.
>
> *Parker* v. *United States*, 1 Peters 293, 297.

The plain meaning is that the President need not *personally* sanction the determination; it is enough if it be sanctioned by the appropriate officer of the Executive, directed or permitted to act in the matter pursuant to *general authority* from the President.

> *In re Brodie*, 128 Fed. 665, 670 (per Van Devanter, J.)

And it was unquestionably with reference to the presumption of a general, anticipatory delegation of power that Mr. Justice Van Devanter said in *Chic. M. & St. P. Railway* v. *United States*, 244 U. S. 351, 357:

> The power to establish the reserve included the power to make the temporary withdrawal, and the act of the Secretary of the Interior in directing the latter was in legal contemplation the act of the President.

In view of the clear and consistent attitude of this court with reference to delegation of presidential duties, slight consideration need be bestowed upon the decisions of other courts.

The delegation of the duty of making even quasi judicial determinations has been upheld in the following cases:

> *In re Way Tai*, 96 Fed. 484, 486.
> *Rainbow* v. *Young*, 161 Fed. 835, 838.
> *Kahn* v. *Garvan*, 263 Fed. 909, 915.
> *Roxford Knitting Co.* v. *Moore*, 265 Fed. 177.
> *John Shillito Co.* v. *McClung*, 51 Fed. 868.
> *Stapleton* v. *Duell*, 17 App. D. C. 575, 583.

In *Porter* v. *Coble* (246 Fed. 244, 249) the question was whether, without consulting the President, the Postmaster General had power to remove Porter, a postmaster of the third class. Under the terms of the act of July 12, 1876 (19 Stat. 78, 80; Comp. St. 7190), such postmasters "may be removed by the President." Judge Smith, after citing *Wilcox* v. *Jackson*, 13 Pet. 498, 513, and *Wolsey* v. *Chapman*, 101 U. S. 755, 769, upheld the validity of the removal on the ground that:

> The President *may have authorized* the Postmaster General to make *removals in his stead when necessary.*
> *Porter* v. *Coble*, 246 Fed. 244, 249.

The doctrine for which we contend is expressed with especial clearness in:

United States v. *Warfield*, 170 Fed. 43, 45.

In re Neagle, 39 Fed. 833, 860 (aff'd 135 U. S. 1).

Hayden v. *U. S.*, 38 Ct. Cls. 39, 50, 51.

The following decisions are also illustrative of the same principle:

In re Huttman, 70 Fed. 699, 702.

Motherwell v. *United States*, 107 Fed. 437, 451, 452; Judge Bradford's views approved on appeal sub nom. *Tucker* v. *Alexandroff*, 183 U. S. 424.

Stegall v. *Thurman*, 175 Fed. 813.

May v. *United States*, 236 Fed. 495, 499.

Ex parte Givins, 262 Fed. 702, 707; affirmed 255 U. S. 11.

M'Collum v. *United States*, 17 Ct. Cls. 92, 101.

Duryea v. *United States*, 17 Ct. Cls. 24.

Maxwell v. *United States*, 49 Ct. Cls. 262, 273.

Hickey v. *Huse*, 56 Me. 493, 495.

In concluding the subject of delegation, one more quotation is, perhaps, permissible. In sustaining the delegability of the duty of making even quasi judicial determinations, the Circuit Court of Appeals for the Second Circuit said:

> "The act of a head of a department is in legal contemplation the act of the President (*Scott* v. *Carew*, 196 U. S. 100, 109, 110). He speaks and acts through the heads of the several departments in relation to subjects which appertain to their respective duties

Wolsey v. *Chapman*, 101 U. S. 755, 769; *Runkle* v. *United States*, 122 U. S. 543, 557. And as it is impossible that each head of a department should perform in person all the business of his department, the law allows him to act through subordinate agents in his department, whose legal power is included in his, just as his is included in that of the President." (*Roxford Knitting Co.* v. *Moore*, 265 Fed. 177, 190; cert. den. 253 U. S. 498.)

(e) No support is to be found in the legislative history of the 1920 Army reorganization act for the view that section 24b requires personal consideration and action by the President.

On the contrary, the legislative history supports the natural, primary meaning of the statutory language; which is, that the President has a mere *privilege* of acting personally if he chooses.

The Military Affairs Committee of the House of Representatives reported a bill which, if adopted, would have denied both the President and the Secretary of War the right to consider the classification of officers (Report No. 680, Feb. 26, 1920, H. R. 12775). The language of the bill was: "The findings of the" (classification) "board shall not be subject to review *by any authority*" (59 Cong. Rec. Mar. 13, 1920, perm. p. 4289, temp. p. 4606). The House itself, however, amended by requiring action by the Secretary, if appealed to by the officer, but necessarily indicated thereby that no action by the President was to be required or permitted. (59 Cong. Rec. Mar. 13, 1920, perm. pp. 4310–4313, temp. pp. 4626–4628; Mar. 16, 1920, perm. pp.

4400–4411, temp. pp. 4712–4721; especially perm. p. 4411, temp. p. 4721.)

The proceedings and reports in the Senate throw no light upon the question. They make no mention of personal or other action by, or in the name of the President or Secretary, except to the extent of giving the President the right to order a revision after action by the final classification board and of requiring him to convene the preliminary classification board. Language to this effect, which now constitutes the part of the statute under consideration, was included in the original Senate bill (S. 3792, sec. 44), has been retained ever since by the Senate, and was agreed to in conference. The report of the conferees throws no light upon the question (H. R. Rep. No. 1049, May 27, 1920).

See also legislative proceedings affecting the asserted right to a hearing before the honest and faithful board (infra, pp. 104–107).

(f) The reasons assigned by plaintiffs in error for regarding elimination proceedings as judicial in character are unsound.

1. The statement (Brief, p. 13) that the statute specifically provides that the President shall be the convening authority of the court of inquiry and military boards to determine the question of classification and the causes therefor is erroneous. There is only one body which section 24b specifically makes convenable by the President, to wit, the preliminary classification board (sentence 1, supra, p. 7), a board which determines nothing. It is somewhat like a

grand jury, except that the subject matter of its deliberations is unrelated to anything criminal or penal (*In re Nash*, 181 N. W. 570, 572; *Police Com.* v. *Pritchard*, 36 N. J. L. 101; *McCran* v. *Gaul*, 112 Atl. 341, 342, 344, 603, 606). It sits in secret and its action is merely by way of inviting a future hearing and determination of the classification of officers by it tentatively regarded as belonging to class B; unless, indeed, these officers voluntarily accept class B as their proper classification.

2. The President, if he convenes the court of inquiry, the final classification board, or the honest and faithful board, does not thereby necessarily obligate himself to review their action; and where, as in carrying into effect the elimination statute of October 1, 1890, a presidential review *is* required, the duty is delegable to the Secretary of War (*In re Maj. Ewing*, 27 Ops. Atty. Gen. 193, 198).

Military boards, in general, are investigating or advising bodies whose duties are fixed by the convening authority. The officer for whose benefit such boards are really functioning (whether he be the convening authority or a superior of the latter) is not required to review their action, although the nominal convening authority is sometimes so required. In view of the fact that the passage cited from Winthrop, pages 795–822 (Brief of plaintiffs in error, p. 13), has reference exclusively to courts of inquiry, it is assumed that the contention that the convening authority must always review the action of *military boards* is mere inadvertence.

Winthrop's discussion is, however, in point as to courts of inquiry, but he seems to be an authority against relators' contention. He says that there are three principal functions of a court of inquiry; the second of which he states to be that it investigates "for the purpose *simply of informing and advising* the convening official" (Winthrop, Military Law and Precedents, p. 806). The latter would not, of course, be bound to reach any conclusion, or make any determination of his own in a case of this kind. He could use the information or ignore it, as he saw fit. Indeed, he might properly not even read the report or proceedings of the court of inquiry, if his need for the information originally desired had gone by or, for some other reason satisfactory to himself, he regarded the proceedings as no longer worthy of study.

Subsequently, Winthrop, after pointing out that the proceedings in the court of inquiry are not "a trial, but *an investigation merely*," says in substance under the head "Promulgation" that, in the case of the proceedings and report of an ordinary court of inquiry, the convening authority ought not to publish its report or its result until he should have made a determination of his own with reference to the case, but that he may *omit altogether* to publish the report or result, in which event, apparently, the convening authority is not regarded by Winthrop as under any duty to reach a conclusion of his own or to devote his time to considering or reviewing the case (Winthrop, Military Law and Precedents, p. 820).

The same conception is adopted in the Manual for Courts Martial, par. 472.

Relators' contention also takes no account of the fact that a court of inquiry, convened to act in an elimination proceeding, differs materially from the ordinary court of inquiry. The former is required by statute to *forward* the record of its investigation *to the final classification board* (sentence 5 of sec. 24b, army reorganization act; supra, p. 8), instead of being required, as is the ordinary court of inquiry, to forward the record of its proceedings to the convening authority (A. W. 103; 41 Stat. 807). The court of inquiry functioning under section 24b is also unlike the ordinary court of inquiry in not being limited to the investigation of particular transactions, accusations, or imputations. (A. W. 97.)

3. Plaintiffs in error are grasping at a straw when they assert (Brief, p. 15) that Congress must have deemed elimination to be a judicial proceeding because courts of inquiry and military boards are "tribunals" or bodies of "judicial character."

The fact is that there is no military tribunal in any proper sense, except the court-martial. The utmost that can be said for a court of inquiry is that its procedure is almost the same as that of a court-martial, and that in gaining information, it has a good part of the powers of a court-martial.

Winthrop says:

> "The court of inquiry, so called, is really not a court at all. . . . Its proceedings are not a trial, nor is its opinion (when it ex-

> presses one) a judgment. It does not administer justice and is not sworn to do so, but simply to examine and inquire. It is thus not a court, but rather a board . . . of investigation."
>
> Military Law and Precedents, p. 797.

Winthrop quotes (p. 797) the following very accurate definition of the nature of a court of inquiry:

> "A court of inquiry has no judicial power and is, in strictness, not a court at all, but an assembly of persons directed by the commanding officer to collect evidence with respect to a transaction into which he cannot conveniently himself make inquiry."
>
> British Rules of Procedure, 123(D).

So, too, the Judge Advocate General (1912 Digest Ops. p. 178) says that a Court of inquiry is not a court, but rather a board.

The matter should, however, be deemed set at rest by the Manual for Courts Martial, par. 461, which, being an Army regulation promulgated as such by President Wilson (Executive Order of 17 December 1920), pursuant to the authority conferred upon him by Congress in Article of War 38, has the force of law (see *In re Brodie*, 128 Fed. 665, 669). This reads:

> "A court of inquiry is *not* really *a court in the judicial sense* of the term, for no criminal issue is formed before it; it arraigns no accused, receives no plea, makes no findings of guilt or innocence, awards no punishment." (C. M. M. 461.)

The court of inquiry may or may not make recommendations or express opinions; normally it does

not do so (A. W. 102). Whether or not the court of inquiry makes a recommendation or expresses an opinion, it never makes (judicial, quasi judicial, or other) decisions or determinations in any proper sense. Although styled a court because of its using quasi judicial procedure, it is not a court in fact. As was said by Attorney General Moody, afterwards a justice of this Court, a court of inquiry does not "perform any real judicial function." (25 Ops. Atty. Gen. 623, 625.)

Military boards do not require consideration in this connection, as their resemblance to anything judicial is still more remote than that of courts of inquiry.

II.

THE VALIDITY AND EFFECTIVENESS OF THE ELIMINATIONS OF PLAINTIFFS IN ERROR ARE NOT IMPAIRED BY ANY DEFECT IN THE MATTER OF ACCORDING THEM ESSENTIAL HEARINGS.

This point relates only to Col. Creary's not having been given a hearing by the honest and faithful board; for the action of the honest and faithful board was favorable to Col. French and it is now conceded that the hearings elsewhere were sufficient as to both relators.

A

NO HEARING BEFORE THE HONEST AND FAITHFUL BOARD UPON THE QUESTION OF WHETHER OFFICERS, CLASSIFIED IN CLASS B, HAVE BEEN SO CLASSIFIED BECAUSE OF NEGLIGENCE, MISCONDUCT, OR AVOIDABLE HABITS, IS ESSENTIAL TO THE VALIDITY OF AN ORDER DISCHARGING THEM.

Upon this much-contested subject, it is submitted that the following principles are now established in

the Federal courts and in the great majority of other jurisdictions.

Where a specified fact or condition or course of conduct of a discreditable or disqualifying nature is specifically stated by statute as the cause of removal of a nonmilitary officer, the existence of the disqualifying fact is to be regarded as a condition precedent to the right of removal under such statute and the essential fact necessary to satisfy the condition must be ascertained by the removing authority through notifying the officer concerned, giving him an opportunity to prepare and present his defense and according him a hearing; unless the right to a hearing is dispensed with by the statute, either expressly or impliedly. In other words, if the legislature pass a statute of the character just mentioned, a legislative intention to require a hearing is to be implied by construction, in the absence of express statutory language on the subject.

On the other hand, no notice or hearing is to be deemed a condition precedent to the right of removal in case the statute authorizes removal without cause or for cause without particularly defining the cause. (*Ayers* v. *Hatch*, 175 Mass. 489; 56 N. E. 612, 613.) Moreover, in case the legislature authorize removal for specified causes, which are not ascertainable facts or conditions, but which are matters of opinion, no notice or hearing is necessary. Cases of this kind are presented when the legislature authorizes removal in the event that the incumbent of office is "unfit for the discharge of his duties" or when the

legislature specifically defines the causes of removal, which amount to facts or conditions, but provides further that the removal is to be had only where the facts or conditions in question are made to appear to the satisfaction of the removing officer (*State* v. *Crandall*, 269 Mo. 44; 190 S. W. 889, 891, 893).

Where, therefore, the statute, instead of *defining* a fact or a condition, the existence whereof is intended to justify removal, the statute merely authorizes removal "for good and sufficient cause," no notice or hearing will be regarded as impliedly required by the legislative intent (*Hertel* v. *Boismenue*, 229 Ill. 474; 82 N. E. 298).

(a) The general principles governing removal of officers must be applied with caution when dealing with the exceptional situation which is regulated by section 24b of the Reorganization Act.

Eliminations under the present Reorganization Act ought to be governed by the principles enunciated by this court in dealing with the effect of the previous Army elimination acts (supra, pp. 16, 19; infra, pp. 97–103) rather than those dealing with the effect of nonmilitary removal acts. The controlling principle in construing these elimination acts is one based on the manifest general purpose of Congress to raise the standard of efficiency of the Army or to reduce the commissioned personnel to the number which accords with the changed condition of the country. In their specific provisions, these acts should be so interpreted as to promote this general purpose, in so far as this may be done without doing violence to the statutory language.

Moreover, such construction should take account of the fact that the tenure of office of a military officer is insecure to a degree otherwise unknown. It is, in the language of the Court of Claims, the "frailest known to the law" (*Street* v. *U. S.*, 24 Ct. Cls. 230, 247), and the fundamental relation now existing between the Government and the officer, and which has always existed in this country, is that his incumbency of his office is solely "during the pleasure of the President of the United States" for the time being.

From these characteristics of military office, two deductions are deemed legitimate and sound, to wit:

(1) Any removal of a military officer by the President is to be deemed valid under the President's inherent power to remove without cause, irrespective of the provisions of section 24b (infra, p. 111); and (2) mere failure of the legislative body to give any indication of its will, in respect of a hearing, does not necessarily raise a presumption of legislative intent to grant a hearing before removal, even in cases where the authorized removal is for cause; but, as regards legislation which, like section 24b, seeks to raise the standard of efficiency of military officers in any particular grade or to diminish the number of officers to be supported at public expense, such failure to indicate the legislative will raises the contrary presumption. *Reaves* v. *Ainsworth*, 219 U. S. 296 (see infra, p. 97; supra, p. 17).

(b) Even where nonmilitary officers are by statute removable for misconduct or other particularly specified cause, notice and hearing are, or are not essential, according to the legislative will ascertained from the statute.

1. As the incumbency of office is not a property right (supra p. 19; *State* v. *Grant*, 14 Wy. 41, 81 Pac., 795, 798; *Trimble* v. *People*, 19 Colo., 187, 34 Pac., 981, 985), an officer is not entitled to require that his removal shall only take place after "due process of law" in the constitutional sense of that phrase. But, in another sense, he is entitled to due process of law; for he is not removable under a particular statute, unless the method of procedure pointed out in that statute is resorted to and the officer given the benefit of it. The "statute constitutes the law of the case" (*Reaves* v. *Ainsworth*, 219 U. S. 296, 298). The means of avoiding injustice, which it provides, are for him "due process of law."

In giving effect to a statute that authorizes removal by reason of any ascertainable fact, the rule that such fact must be ascertained through notice and hearing is only *a rule of construction*, deemed to conform with the probable legislative intent. But there are other rules of construction for the ascertainment of the legislative will, which other rules do not necessarily or even usually yield to the rule of construction referred to, in cases in which the different rules, considered independently, would lead to different results.

One of the other rules of construction for the ascertainment of the legislative will is that a statute

is not to be regarded as working a change in a well understood feature of the administration of the Government, unless the statute makes it clear that such change is intended (*In re Major Ewing*, 27 Ops. Atty. Gen. 193, 197, 198; *State ex rel Palmer* v. *Hickman*, 11 Mont. 541; 29 Pac. 92, 93). In construing the promotion or elimination statute of October 1, 1890, this court refused to read into it by implication an intent to grant officers a hearing before the examining board (which would have been the only opportunity for a hearing), saying: "If it had been the intention of Congress to give to an officer the right to raise issues and controversies with the board * * * such intention would have been explicitly declared" (*Reaves* v. *Ainsworth* 219 U. S. 296, 306). Lieutenant Reaves was accordingly eliminated without anything in the nature of a real hearing (219 U. S. at 302). In view of the power of removal of military officers without a hearing, which has been a part of the military system for so long a time, it may well be said in the language used in *Shurtleff* v. *U. S.* (189 U. S. 311, 315): "To take away this power of removal * * * would require very clear and explicit language. It should not be held to be taken away by mere inference or implication."

The most important rule of construction, applicable to the question of hearing before the honest and faithful board, however, is the rule of "expressio unius, exclusio alterius." Upon reading the language of section 24b of the reorganization act consecutively, it seems impossible to escape the conclusion that, because Congress has *expressly dealt with* the subject

of the hearing or *hearings* which it has deemed necessary, before permitting an officer's status under that section to be altered, Congress has necessarily *covered the entire field* of providing for hearings and has said by implication that there may be no other hearing than that which Congress has required.

In successive sentences, Congress has directed the creation of four bodies of administrative officers to consider, on the one hand, the welfare of the Army and, on the other hand, justice to its officers. It has significantly provided that before *one* of these boards, to wit, the court of inquiry, there shall be a hearing accorded to the officer concerned, after notice and opportunity to prepare his case, irrespective of what the scope of the hearing was intended to be. If Congress had intended to require a hearing before any other of these four bodies, Congress would have said so expressly or at least unmistakably.

2. On the point just stated, the court said in *State ex rel. Brandt* v. *Thompson*, 91 Minn. 279; 97 N. W. 887:

> The subject of removal of all officers is within legislative control, and where that body prescribes a manner and method of removal, it is exclusive.

For the courts to require *two* hearings under section 24b would be violative of this principle and would be, in effect, an encroachment upon the legislative functions.

Substantially the same reasoning as is here invoked was applied by the court in *Hamilton* v. *Grant*, 14 Wyo. 41. In that case, the court said:

> "Having conferred the power" (of removal) "upon the governor in language which is plenary, it adds: 'Provided reason for such removal shall be filed in the office of the Secretary of State, in writing, subject to inspection by any person interested'—thereby declaring the express conditions and limitations under which the governor may act. Having entered upon the realm of limitation, the enumeration of one condition precludes the idea that there should be others not expressed. *Expressio unius est exclusio alterius.* To our minds the language of the proviso is inconsistent with the idea of a hearing."
>
> *State ex rel. Hamilton* v. *Grant*, 14 Wyo. 41; 81 Pac. 795, 797, 798, 799.

The same useful principle of "expressio unius" also furnished the *ratio decidendi* in *People* v. *Draper*, in which the court said:

> We have, therefore, on the one hand, the legislature, at about the same time under the same conditions, explicitly providing for a trial in case of removal of members of boards of education; while, on the other hand, as to school commissioners and other school officers, such a provision is not added. It may be fairly said, after an examination of these provisions, that the legislature, having full knowledge of the condition of affairs that existed in the State of New York, intended, in that class of cases, that no notice or opportunity of defense should be given. * * * In *People ex rel. Clingan* v. *Draper*, 63 Hun. 389, 18 N. Y. Supp. 282, the removal of a school trustee was sustained though no

> hearing had been accorded him, although, upon relator's brief, that was strongly urged as in violation of his rights. The court, under these authorities finds no difficulty in holding that the omission in section 338 of express provisions for notice and hearing contained in section 228 was intentional, and that the relator was not entitled as a matter of right to notice of, or a hearing.
>
> *People* v. *Draper*, 124 N. Y. Supp. 758, 762, 764.

In the case of *State* v. *Burke*, 8 Wash. 412 (36 Pac. 281, 284), the ordinary inference that in removals authorized for "misconduct in office" a hearing is intended was rebutted by other, similar indications of legislative intent, found in the text of the statute.

In *State on inf. Barker, Atty. Gen.* v. *Crandall*, 269 Mo. 44 (190 S. W. 889, 891, 893), removal of a police commissioner, under a statute authorizing removals for "official misconduct," was sustained as valid, notwithstanding absence of notice or hearing, primarily on the ground that the statutory language (R. S. 8770) required the removing authority to be "fully satisfied" of the misconduct and thus indicated a legislative intent not to require a hearing (see especially opinion of Blair, J). But the rule of *expressio unius* was also relied on as supporting the view that the unexpressed intent of the statute was to dispense with a hearing because, in a different removal provision of the same statute, the intent to require a hearing was expressed. Judge Bond said (190 S. W. at 890):

> "The legislature made a wholly different provision in dealing with the power of the police commissioners to remove members of the police force and permitted that to be exercised only 'for cause *after a hearing* by the board.' R. S. 8773."

3. The leading authority on military removals is, no doubt, *Reaves* v. *Ainsworth*, 219 U. S. 296, in which the elimination from the Army of Lieut. Reaves, although he was denied the essentials of a hearing, was sustained as valid under the act of October 1, 1890 (26 Stat. 562).

Plaintiffs in error challenge the controlling effect of the Reaves case, in constraining a decision here that Col. Creary was not entitled to a better hearing than that which he received, by contending that the act of 1890 "was one which authorized the President to establish a system of examination for promotion, not removal from office for specified cause" (Brief, p. 14). A perusal of the statute, however, will show that it *did* authorize removals for specified causes.

Section 1 of the act recognizes the general rule of promotion by seniority. Section 2 deals with the nature of military commissions. Section 3 authorizes the President "to prescribe a system of examination of all officers of the Army below the rank of major to determine their fitness for promotion" and expressly gives the President unlimited discretion as to how long before the time for promotion, the question of their fitness for promotion shall be determined. In the remainder of this section, provision is made for those whose fitness for

promotion is determined adversely, to wit, that those who are unfit, for one rather limited *cause* specified in the statute, shall be retired in an advanced grade, while those who are found unfit for any other cause shall be discharged. The statutory language, pertinent upon the causes for elimination on the basis either of retirement or discharge, is as follows; all of it limited, however, to cases in which, upon his first examination, "any officer fails to pass a satisfactory examination and is reported unfit for promotion":

> "Should the officer fail in his physical examination and be found incapacitated for service *by reason of physical disability contracted in line of duty*, he shall be retired with the rank to which his seniority entitled him to be promoted; but if he should fail *for any other reason*, he shall be suspended from promotion for one year, when he shall be reexamined, and in case of failure on such reexamination" (to establish his fitness for promotion or, probably, to establish unfitness due to physical disability contracted in line of duty, *In re Maj. Ewing*, 27 Ops. Atty. Gen. 193) "he shall be honorably discharged, with one year's pay, from the Army."
>
> 26 Stat. 562.

This language is followed by a proviso which accords special treatment to those who, during the War of the Rebellion, were officers of the volunteers or militia or who received their appointments to the Army direct from civil life. As to these, the act provides that the presidential examining boards

shall be composed entirely of officers of the same class (ex-volunteers, ex-militia, etc.) and that the examination, while including, of course, their "fitness for practical service," shall exclude any testing of "technical and scientific knowledge." By an amendment to the act, however (act of July 27, 1892; 27 Stat. 276), officers entitled to this special treatment were empowered to waive it and subject themselves to the same "technical and scientific" examination, by the same examining boards as officers who had entered the Army from West Point.

There are important differences between the act of Oct. 1, 1890, and the act under which these plaintiffs in error were eliminated from the Army, in the matter of procedure. The former act, except in requiring examining boards and, as to one class of cases, in making provision for the character of personnel of such boards, left the matter of procedure entirely to the President, whereas the act of 1920 prescribed the procedure in certain important particulars. But the main purpose to be accomplished by the two acts is the same, to wit, the elimination of the unfit from the active list and their treatment after elimination, according to the *cause*, in virtue of which, they are found to be unfit; (1) eliminations due to causes consistent with their deserving the gratitude of the country being accomplished, under both acts, through retirement and (2) eliminations due to causes less likely to involve their meriting such gratitude being accomplished, under both acts, through discharge. Of the act of 1890, this court has said: "Its purpose

is to secure *efficiency* in those who are to be active in service" (naturally by eliminating those who are inefficient and do not succeed, upon a second examination, following the first by a year's time, in making themselves efficient), "and physical capacity, of course, is as necessary as mental capacity."

Reaves v. Ainsworth, 219 U. S. 296, 305.

The Act of October 1, 1890, was, no doubt, a promotion statute, as plaintiffs in error point out; but the changes in the preexisting system of *promotions* were unimportant, in comparison with the important requirement for the *elimination* of officers by retirement or discharge. It was an elimination statute even more than a promotion statute. Aside from the matter of procedure, there are two salient differences between these two elimination statutes.

(1) The promotion-or-elimination act of 1890 made elimination the consequence of *unfitness for promotion*, that is, for active service in the higher grade. This was construed by the War Department to involve deferring the elimination of an officer, found unfit, until the time when, if fit, he would have been promoted. (G. O. 128, W. D. Oct. 29, 1890, par. IX.) The elimination statute of 1920 (section 24b of the act of June 4), on the other hand, required elimination of those *unfit to continue* to serve *in their existing grades.*

(2) The act of 1890 was less liberal in giving eliminated officers the benefit of retirement than is the act of 1920. Every cause of elimination which, under the former, would lead to retirement leads also to

retirement under the latter; for "physical disability", if "contracted in line of duty" (act of 1890), could scarcely be due to his "neglect, misconduct, or avoidable habits" (act of 1920). 32 Ops. Atty. Gen. 12; *Reaves* v. *Ainsworth*, 219 U. S. at 305; *Steinmetz* v. *U. S.*, 33 Ct. Cls. 404, 410. Certain causes of elimination, however, which under the act of 1920 would lead to retirement, led to discharge under the act of 1890. One of these was unfitness due solely to non-culpable, professional deficiencies (*In re Ewing*, 27 Ops. Atty. Gen. 193).

The following four causes of elimination required determination under the act of 1890, as construed, rightly, no doubt, by General Orders No. 128, W. D., October 29, 1890, Par. II: (*a*) Physical disability contracted in line of duty, (*b*) physical disability contracted otherwise than in line of duty, (*c*) professional or mental unfitness or inefficiency, and (*d*) moral defects or an insufficiently good character.

Elimination by retirement was required by the statute for cause (*a*), whereas elimination by discharge was required for causes (*b*), (*c*), and (*d*).

This, then, was the nature of the promotion-or-elimination act, under the terms of which, Lieut. Reaves claimed that he was entitled to a hearing before elimination and particularly that, if eliminated, he ought to have been retired, instead of being discharged. Reaves was, in fact, given nothing more than the pretense of a hearing before the examining board, whose proceedings of August 21, 1905, constituted the basis of the order discharging him from the

service of the United States for cause (*c*) of the causes stated above. This court said (219 U. S. at 300, 302):

> "The board convened at Fort Monroe August 21, 1905, and he" (Reaves) "appeared before it pursuant to orders. He was found physically fit for duty. He failed, however, in his mental examination. * * * He presented the names of about thirty witnesses. * * * Plaintiff in error" (Reaves) "was not allowed to call witnesses, nor to inspect exhibits presented to the board, nor to cross-examine the surgeons on their report."

The court, at page 304, referred to the provisions of R. S. 1248 conferring upon retiring boards "such powers of a court-martial and of a court of inquiry as may be necessary;" and at page 305, it referred to the provisions of the act of October 1, 1890, relating to retirement for one particular statutory cause and quoted certain of the more detailed provisions found in G. O. No. 128, W. D., October 29, 1890, referred to above and relating to the same subject. It then continued:

> "If it be disputable whether these provisions guarantee to an officer 'the safeguards of a trial in court,' it is certain that the decision is not final with the board. * * * If it had been the intention of Congress to give to an officer the right to raise issues and controversies with the board upon the elements, physical and mental, of his qualifications for promotion, * * * such intention would have been explicitly declared."
>
> *Reaves* v. *Ainsworth*, 219 U. S. 296, 306.

The proceedings of the examining board and the action thereon of superior authority were therefore held not open to attack by Reaves, despite the denial of a hearing and despite the fact that the discharge was for cause.

4. The construction which the War Department has placed upon section 24b, and has applied to Colonel Creary and Colonel French is one under which no hearing is accorded to an officer before the honest and faithful board, but only before the court of inquiry. Unless clearly wrong, this construction should prevail. For, as has so often been said:

> "The construction given to a statute by those charged with the duty of executing it is always entitled to the most respectful consideration and ought not to be overruled without cogent reasons."
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> *United States* v. *Moore*, 95 U. S. 760, 763.
>
> *Edwards* v. *Darby*, 12 Wheat. 207, 210.
>
> *Hastings Railroad* v. *Whitney*, 132 U. S. 357, 366
>
> *Boston & M. Railroad* v. *Hooker*, 233 U. S. 97, 117, 118.
>
> *La Roque* v. *United States*, 239 U. S. 62, 64.

This principle applies with peculiar force in cases in which officers and soldiers are attacking, in the courts, acts of their military superiors in the organization or control of the Army. For in these cases, judicial annulment or condemnation of the action of the military authorities is necessarily, to some extent, prejudicial to military discipline.

On this subject, the New York Court of Appeals has said:

> "To compel the superintendent or warden * * * to reinstate, against his judgment, a discharged keeper or guard, would introduce into prison management a most mischievous principle. It might, and probably would, produce great demoralization, and tend to the destruction of all order and discipline. It would have much the same effect upon prison discipline, though perhaps in a less degree, that it would have upon *military discipline* if appointments and removals in the Army were to be regulated by writ of mandamus."
>
> *People ex rel. Griffin* v. *Lathrop*, 142 N. Y. 113, 116; 36 N. E. 805, 806.

See also:

> *White* v. *Berry*, 171 U. S. 366, 378.
> *Reaves* v. *Ainsworth*, 219 U. S. 296, 306.

The decisions which plaintiffs in error have cited (Brief, p. 17) are not relevant to any controverted question. Those most nearly in point are illustrations of the conceded proposition that where a statute authorizing the removal of nonmilitary officers for causes specified therein, affords no indication of legislative intent as to whether such officers shall be accorded a hearing before removal, the intent to accord a hearing is to be implied.

(c) The legislative history of the reorganization act shows that no hearing before the honest and faithful board was intended.

The reorganization bill, as it originally passed the House of Representatives (H. R. 12775), was silent

as to any hearing before the honest and faithful board. It provided, however, that an officer should have a hearing (if he desied one) before the classification board with reference to the subject of classification only, with a right to appeal to the Secretary of War from its findings.

This bill was transmitted to the Senate and referred March 22, 1920, to its Committee on Military Affairs. After being reported, it was amended by the Senate and passed April 20, 1920. The Senate manifested its dissatisfaction with the omission of the House bill to make express provision for a hearing before the honest and faithful board; for it insisted upon an amendment providing for such hearing. As amended by the Senate, the provision read:

> "Whenever an officer is placed in Class "C" (the Senate equivalent of what was denominated class B in the House bill and in the final statute) "a board of not less than three officers shall be convened by the Secretary of War to determine if his service has been honest and faithful. The officer concerned *shall be given a hearing by this board* and in general shall have the rights of an officer being tried by a court-martial."

Section 44 of H. R. 12775, as amended and passed April 20, 1920, by Senate.

The bill then went to conference. What discussion took place there, as between the Senate plan of giving a hearing before the honest and faithful board and the House plan of making no such provision for a hearing, is not referred to in the conference report. All that is known is that the House

conferees prevailed and the Senate conferees receded on this point. The Senate ratified the action of its conferees in abandoning the amendment which previously it had insisted on, and the bill became law, without any provision for a hearing before the honest and faithful board.

The only inference which a court is justified in drawing from this legislative history is that the House of Representatives and its conferees were unwilling to permit the War Department to be harassed by two hearings and insisted that all issues which might properly be the subject of hearings should be disposed of at one hearing, to wit, a hearing before the court of inquiry.

Plaintiffs in error are quite right in their assertion that the Senate committee in its report (No. 400, 66th Cong., 2d sess.) explained that the bill which it was then reporting provided for a hearing before the honest and faithful board. The text so reported was identical with that quoted above as part of section 44. The plan of hearings thus advocated, however, was considered and rejected by the House and never became law.

Other statements made by plaintiffs in error as to the contents of committee reports appear to be without foundation. (See report of Committee on Military Affairs of House of Representatives, Feb. 26, 1920; Report No. 680, p. 11.)

The debates in Congress to which reference is made by plaintiffs in error go no further than to express individual opinions to the effect that (somewhere

and at some time) officers' interests should be protected through proper hearings. No remarks have been discovered on (temp.) pages 4626, 4629, 4712–4724 of the Congressional Record, cited by relators, or elsewhere, wherein the speaker insisted that the hearing, which he advocated, should be before the honest and faithful board or elsewhere than before the body which was to take the evidence on the subject of classification. Moreover, such debates cannot properly influence the judicial construction of a statute. *Lapina* v. *Williams*, 232 U. S. 78, 90.

It may be added that, as appears in 59 Cong. Rec., perm. p. 4289, temp. p. 4606, Mr. Kahn had charge of the bill on the floor of the House on behalf of the committee, not Mr. Greene, as asserted by plaintiffs in error.

See also legislative proceedings affecting the President's right to delegate his functions, if any, under section 24b (supra, pp. 82, 83).

B.

IF THE STATUTE REQUIRES A HEARING UPON THE QUESTION OF WHETHER OFFICERS, CLASSIFIED IN CLASS B, HAVE BEEN SO CLASSIFIED BECAUSE OF NEGLECT, MISCONDUCT, OR AVOIDABLE HABITS, THE REQUIRED HEARING HAS BEEN HAD.

If there be any such required hearing (contrary to what has been contended, supra, in heading "A"), it must be on the theory that Congress intended a hearing upon every issue of importance to the officer concerned and that it seems inconsistent and unjust to require a hearing upon the issue of fitness and to make no similar requirement upon the issue of misconduct, etc.

Whatever the reasoning may be, the very grounds upon which a hearing upon the issue of misconduct may be deemed to have been within the congressional intent compel the acceptance of the view that the hearing, the one hearing which Congress has provided for in so many words, was intended by Congress to subserve the entire congressional purpose: that is, that such hearing was intended to embrace within its scope the issue as to misconduct, as well as the issue as to fitness.

Referring to the language of section 24b, it is found that there is not the slightest indication of the intended scope of the investigation or hearing before the court of inquiry, unless such indication be found in the circumstance that Congress made provision for the hearing in the court of inquiry at an earlier point in section 24b (viz, sentences 3 and 4) than that at which provision is made for the determination of the issue of misconduct (sentence 6). It seems more probable, notwithstanding this circumstance, that Congress intended all issues to be the subject of the hearing before the court of inquiry rather than that (1) the issue of misconduct was not to be the subject of any hearing at all or, if it was, (2) that the House of Representatives thwarted its own purpose, when it refused to concur in the Senate amendment to its original bill, which amendment would have given a hearing on misconduct before the honest and faithful board.

Before the court of inquiry, Col. Creary had the right in person or by counsel to cross-examine

witnesses, to adduce testimony, to submit oral and written argument, all of which was faithfully reported to the final classification board and subsequently to "the honest and faithful board." It is hardly supposed that counsel contend for a right either to repeat before both of these boards the testimony given before the court of inquiry or to call new witnesses whom the officer did not see fit to summon before the court of inquiry. If our view on this point is right, all that he has been deprived of is the privilege of personal appearance and of oral argument. Does any case go the length of holding that where there has been a full opportunity to cross-examine, to present testimony, to submit argument before an inferior officer or body (all to be reported, for consideration by a superior officer or body), an adequate hearing has been denied, merely because personal appearance and oral argument before the superior officer or body are denied? The authorities are all to the contrary.

The hearing before the court of inquiry, being unlimited in scope, necessarily includes any and every fact and circumstance, favorable or unfavorable, whether relating to capacity, ability, efficiency, misconduct, neglect, or disqualifying habits, and any other thing or fact appearing in an officer's record that affects the question whether he should or should not be retained in the service.

His opportunity for full and complete defense before a tribunal is here afforded, to go into the entire question at issue, viz, "Should I be retained

in the service; and if not, what shall become of me?" The justice of the classification being admittedly in issue, its cause (which is in practice inseparable therefrom) is necessarily in issue also. The officer under inquiry is put upon his notice as to everything which may affect his status in the Army. If the record upon which the provisional classification is based contains nothing which spells misconduct, etc., he then knows that he is not required to defend against any such situation; for no new fact or record can be injected into any case (nor has any been injected into the cases of these relators) without notice and opportunity to meet it, by proofs before the court of inquiry. If, on the other hand, the record does contain matter of this nature, he then knows what is held against him, and he has his opportunity to rebut it.

C.

THE DISCHARGE OF COL. CREARY FROM THE ARMY WAS VALID AND EFFECTIVE, EVEN IF NO OPPORTUNITY WAS ACCORDED HIM FOR A HEARING ON THE ISSUE OF MISCONDUCT.

Point A was devoted to showing primarily that no hearing before the honest and faithful board was required by section 24b, for that fact of itself is enough to support the judgment below as against the attack based on alleged want of hearing.

It was shown incidentally, however, that no hearing, on any subject or before any body, should be deemed required by the statute, except that which its language plainly requires; and this, it must be conceded, has been had. Point B alone, if well taken, would also be sufficient to support the judg-

ment below. It is confidently believed that the present point will not require consideration.

It is nevertheless true that even if (contrary to our contentions) section 24b did require a hearing on the issue of misconduct and no opportunity for such a hearing was afforded, still the discharge of Col. Creary must be held valid on grounds unconnected with section 24b.

(a) The proceedings under section 24b may, if necessary, be treated as superfluous and Col. Creary's discharge sustained as an exercise of the President's fundamental power to remove officers appointed by him.

The power to remove, as an incident of the power to appoint, is well established.

> *Burnap* v. *United States*, 252 U. S. 512, 515, and cases cited.

It is, however, conceded that where (under Const., Art. II, sec. 2, clause 2) Congress has, by statute, conferred the power of appointment in a given case upon the head of a department *virtute officii*, Congress may also limit or deny the correlative right of removal; for "the head of a department has no constitutional prerogative of appointment to offices independently of the legislation of Congress." (*Perkins* v. *U. S.*, 20 Ct. Cls. 438, 444; affirmed 116 U. S. 483; see also *Burnap* v. *U. S.*, 252 U. S. 512, 515.)

Nevertheless removals from office, by authority of the President, of persons appointed by the President, stand upon a different footing; and this court has repeatedly refused to sanction the view that Congress

has constitutional power to limit or deny the President's right of summary removal from office.

U. S. v. *Parsons*, 167 U. S. 324, 334, 335.
United States v. *Perkins*, 116 U. S. 483, 484.

But even if, in enacting section 24b, Congress might constitutionally have limited the President's power to remove Army officers summarily, it has given no sufficient expression of legislative will in that regard. For a statutory specification of the causes of removal is not to be construed as an attempted limitation upon the power of summary removal.

Shurtleff v. *U. S.*, 189 U. S. 311, 315, 316.
Blake v. *U. S.*, 103 U. S. 227, 234, 235.

The fact that ineffectual steps toward the removal of an officer for cause have been taken does not justify the latter in bringing mandamus or prohibition, where the removing authority has a concurrent right of summary removal.

Conwell v. *Village of Culdesac*, 13 Idaho 575; 92 Pac. 535.

If, on the other hand, it be said that the President did not exercise his power of summary removal, because section 24b was recited in the order of discharge (Creary Rec. p. 12), the answer is that *if* a right of hearing conferred by section 24b was denied, such recital must be treated as surplusage. For, as was said by Mr. Justice Peckham in *Shurtleff* v. *United States*, 189 U. S. 311, 314:

> "It must be presumed that the President did not make the removal for any cause assigned in the statute, because there was given

to the officer no notice or opportunity to defend."

(b) Col. Creary's discharge was also justified by the 118th article of war.

The statute referred to (A. W. 118; 41 Stat. 811) in substance authorizes officers to be discharged or dismissed, in time of war, "by order of the President or by sentence of a general court-martial."

Wallace v. *United States*, 55 Ct. Cls. 396, 404; affirmed by this court Feb. 27, 1922, on other grounds.

The discharge of Col. Creary November 17, 1920, was in time of war; for the war with Germany and Austria did not end before March 3, 1921. (Joint resolution of March 3, 1921; 41 Stat. 1359.)

Ex parte Sichofsky, 273 Fed. 694, 696.

The power of discharge conferred by this statute is certainly concurrent with that provided for in section 24b, as both powers are included in the same act of Congress.

III.

EVEN WERE THE ELIMINATION PROCEEDINGS FATALLY DEFECTIVE, THERE IS NO REMEDY BY WAY OF MANDAMUS.

It is manifest upon the slightest perusal of section 24b, and it is indeed conceded, that the eliminations therein provided for involve an exercise of the authority of the presidential office and not of that of the Secretary of War *virtute officii*. The latter is nowhere mentioned or referred to in the elimination section, except in the latter part, and there, only with refer-

ence to acts to be done after the elimination is completed. But the courts have no jurisdiction over the President by way of mandamus; and mandamus can not lie against the Secretary to coerce an act, in the absence of some duty to perform it, imposed upon him by law *virtute officii*.

Moreover, any defects due to nonconformity with a statute, the meaning of which is fairly debatable, are not remediable through the drastic and summary writ of mandamus. Furthermore, the offices claimed by plaintiffs in error have expired by lapse of time, since these actions were begun, and there is now nothing upon which mandamus can operate.

A.

THE COURT OF APPEALS WAS RIGHT IN HOLDING THAT THE ELIMINATION OF PLAINTIFFS IN ERROR, BEING BY PRESIDENTIAL ORDER, CAN NOT BE CALLED IN QUESTION UPON MANDAMUS.

The Court of Appeals, referring to the function of making the final determination, in respect of eliminations from the Army and to effectuating that determination by an appropriate order, used the following language:

> "The President may, of course, perform this function personally, or, as in this instance, he may delegate it to the Secretary of War. But, in either case, it is an administrative order of the President and, as such, must be vacated as a condition precedent to reinstatement under the writ. But this can not be accomplished in this proceeding, since the executive and administrative action of the President can not be controlled by mandamus" (citing *Marbury*

v. *Madison*, 1 Cranch, 137, and *Mississippi* v. *Johnson*, 4 Wall. 475).

Creary Rec., pp. 68, 69.

Weeks v. *Creary*, 277 Fed. 594, 599.

That the President is not subject to mandamus is, of course, well settled.

Kendall v. *U. S. ex rel. Stokes*, 12 Pet. 524, 608, 610.

Hawkins v. *Governor*, 1 Ark. 570; 33 Am. Dec. 346.

The decision made in the present cases by the Court of Appeals involves an application of a principle which that court had had occasion to recognize in several previous cases.

In *Brown* v. *Root*, 18 App. D. C. 239, Lieut. Brown had been tried by court-martial for a military offense and acquitted. Some weeks later he was tried again for the same offense, sentenced to be dismissed from the service, and dismissed. Subsequently, Brown brought mandamus against Secretary of War Root, alleging nullity of his sentence and dismissal, and asking, in effect, that the Secretary be required to vacate the invalid order of dismissal and to discharge the relator or muster him out of the service honorably, in pursuance of a general order for the mustering out of his regiment, which order was then in force. The court held in effect that, since the Secretary could only act, if at all, in virtue of delegated presidential authority and not as Secretary *virtute officii*, he was not subject to the control of the court by way of mandamus. The court said:

"Without regard to any question of * * * the invalidity of the conviction and sentence

> thereafter for the same offense, the judgment dismissing the relator's petition must be affirmed. * * * Whether, notwithstanding the final action of the court-martial and of the general in immediate command, the relator was entitled to be treated as still in the service * * * was *a question for the President* to determine, in accordance with his duty. The Secretary of War, no matter what powers he may in fact exercise in such matters, is the representative and agent of the President, whose will is executed. As was said of the duties of the Secretary of State, under analogous circumstances, in *Marbury* v. *Madison:* 'He is the mere organ by whom that will is communicated. The acts of such an officer, as an officer, can never be examinable by the courts.' (1 Cranch, 137, 167.)"
>
> *Brown* v. *Root*, 18 App. D. C. 239, 241, 242.

In *Holzendorf* v. *Hay*, 20 App. D. C. 576, 580, a petition for mandamus against the Secretary of State to compel presentation of an international claim was dismissed primarily because the action sought to be coerced was political rather than ministerial. The court nevertheless said:

> "The powers of that department are vested in the President, * * * notwithstanding he may habitually act through the agency of the Secretary of State appointed for that purpose. * * * To coerce the action of the Secretary, therefore, is to attempt the coercion of the President."

In *Ray* v. *Garrison*, 42 App. D. C. 34, it was sought to coerce the Secretary of War, not by mandamus,

but by the analogous (*Pullman Co.* v. *Croom*, 231 U. S. 571, 576; *Darlington* v. *Lane*, 46 App. D. C. 465, 479; *Moore* v. *Heany*, 34 App. D. C. 38) remedy of injunction. The plaintiff, Ray, feared prejudicial action by the Secretary, depriving him of rights conferred upon him by the promotion act of October 1, 1890. Said the court:

> "No duty is imposed upon the" (Secretary of War) "in respect to the execution of the act in question. * * * Where, however, no such duty is imposed, there is no real justification for judicial interference. An attempt to invoke judicial interference in such a case is in effect an attempt to reach the executive" (i. e. the President) "through his representative, which may not be done." (42 App. D. C. at 38.)

The acts of any Federal executive officer inferior to the President are divisible into two great classes, to wit: (1) Acts with the performance of which, such officer is directly chargeable *virtute officii* by the Constitution or by statute, either expressly or by necessary implication, and (2) acts which he is properly required to perform for some superior officer, in virtue of authority committed by law to such superior and by him delegated to the inferior officer in question; the latter having, therefore, no independent duty in the premises.

In the one case, the officer's responsibility is primarily to the Nation and his action, if ministerial and not discretionary, may be coerced judicially; but his action is effective, if at all, *ex proprio vigore* and is

unaffected (except as the statute may otherwise provide) by the approval or disapproval of his executive superiors. *Eberlein* v. *U. S.*, Opinion November 7, 1921, by Mr. Justice Day. In the other case, his responsibility is primarily to his superior officer and he is not subject to like judicial coercion, unless disobedient to the superior.

The two classes of acts, with special reference to acts performed by the Secretary of State (1) *virtute officii* and (2) for the President by delegated authority, are clearly distinguished by Chief Justice Marshall in *Marbury* v. *Madison*, 1 Cranch, 137, 158, 166. The acts of the Secretary of State in affixing seals to, and recording civil commissions, which were expressly required of him by the statute of Sept. 15, 1789 (1 Stat. 68), and his delivering of them, which was impliedly required of him thereby, were deemed duties *virtute officii*, performed independently and not "by the instructions of the President" (p. 158) and for which he was, in general, "amenable to the laws" and the courts "for his conduct" (p. 166); whereas, in respect of acts authorized by the statute of July 27, 1789 (1 Stat. 28, 29), which was entirely analogous to R. S. 216 (supra p. 68), the Secretary "is to conform precisely to the will of the President," and his acts "can never be examinable by the courts" (p. 166).

A similar distinction was recognized in England in *Queen* v. *Lords of the Treasury*, L. R. 7 Q. B. 387, 394, 398. The action was for mandamus to compel payment of certain taxed costs of public prosecuting

officers. Although the duty of payment was admitted to be purely ministerial, mandamus was refused on the ground that the duty was not one imposed upon the cabinet officers in question *virtute officii*, but rather as agents of the Crown. Said Chief Justice Cockburn (at p. 394):

> "Therefore the question comes to be whether the Lords Commissioners of the Treasury, when this money gets into their hands, are bound to apply it as the servants of the Crown or as the servants of Parliament who vote the money. * * * The money is voted by Parliament as a supply to the Crown" (no *direct* responsibility being cast by statute upon the lords).

In the same case, Lord Blackburn said (at p. 398):

> The general principle, not merely applicable to mandamus, but running through all the law, is, that where an obligation is cast upon the principal and not upon the servant, we can not enforce it against the servant. * * * Mr. Gorst argued with great ingenuity that the effect of the act (29 and 30 Vict. c. 39) was in fact to cast a duty upon the Lords of the Treasury; but I am unable to see that the sections amount to anything more than this, that Her Majesty, to whom the money was granted in law, is to administer it according to the advice of her responsible advisers. * * * It seems to me that this obligation, such as it is, is upon Her Majesty, to be discharged through her servants.

The same distinction pervades the entire opinion of this court in *Butterworth* v. *U. S. ex rel. Hoe*, 112 U. S. 50, 56. Mr. Justice Matthews points out the

necessity in some cases for "critical attention" being "given to the language of the statutes defining the jurisdiction of the chief and his subordinates and the special relation of subordination between them respectively;" that relation varying from "mere obedience to direction" of the chief, on the one hand, to cases where "the action of the officer, although a subordinate, is *entirely independent*," on the other hand. As to the duties performed by the subordinate, merely in virtue of authority delegated by the chief, he says:

> "Mandamus evidently will not lie to compel a public officer to do a particular thing which his superior in authority has lawfully ordered him not to do."
>
> *Butterworth* v. *Hoe*, 112 U. S. 50, 54.

Neither will it lie to compel him to undo a thing which his superior has empowered him to do.

The absurdity of attempting to exercise judicial constraint upon an inferior officer, when acting purely in virtue of authority delegated by his superior officer, is apparent from the fact that the superior may thwart the judgment of the court or render it nugatory at any time by acting in person with reference to the particular matter in litigation.

Further authorities seem unnecessary. Nevertheless reference may be made to:

> *State of Georgia* v. *Stanton*, 6 Wall. 50, 77;
>
> *People ex rel Sutherland* v. *Governor*, 29 Mich. 320; 33 Am. Rep. 89, 95;
>
> *McFall* v. *Board of Education*, 101 Tex. 572; 110 S. W. 739;

and to the cases cited in the next point.

B.

THE SECRETARY OF WAR IS IN THIS CASE NOT SUBJECT TO COERCION BY MANDAMUS, BECAUSE NO DUTY HAS BEEN CAST UPON HIM BY LAW VIRTUTE OFFICII.

The writ of mandamus does not properly extend to coercing administrative action, merely because a relator is, in justice, entitled to the doing of the act; it must also be made to appear that the act thus to be coerced is enjoined by law, and *enjoined upon the defendant*. It is not enough that an administrative duty, which may remain unperformed, is plain. Mandamus will not lie unless the duty is *explicitly and peremptorily* enjoined by law upon the officer who is the defendant in the cause. (*Olsen* v. *Herstein*, 32 Phil. Rep. 520, 531.)

1. It seems evident that these petitions were filed against Mr. Baker because it was Mr. Baker who performed the following acts: In the exercise of his discretion, he concluded, upon reviewing both of these elimination proceedings, that the cases of the two relators had been justly disposed of by the various Army boards; he endorsed his approval on the papers; and he signed, or caused the former Assistant Secretary, Mr. Williams, to sign the respective orders of discharge and retirement. But these facts afforded no reason for asking or granting mandamus against Mr. Baker or his successor; for the acts to be performed are not acts which the law requires *virtute officii* of a Secretary of War.

The revocation or vacating of orders of discharge and of retirement is, of course, the duty (if duty there be) of him upon whom the law casts the re-

sponsibility of ordering discharges and retirements. This responsibility is one which the law casts exclusively upon the President of the United States.

United States v. *Corson*, 114 U. S. 619, 620, 621.
23 Ops. Atty. Gen. 30.
R. S. 1243–1253.

The Secretary of War has not the slightest power *virtute officii* in the matter of ordering discharges and retirements, or of granting reinstatements, in cases where that is possible. It is only when he wields the presidential power by a valid delegation thereof that any such orders of his are effective.

The Secretary of War is not the proper party defendant in this case for the same reason that caused the Court of Appeals in *McGowan* v. *Moody* (22 App. D. C. 148, 164) to hold that the Secretary of the Navy was not the proper party defendant. The present case involves the power of the Secretary of War to control the status of military officers; the McGowan case involved the power of the Secretary of the Navy to control the status of naval prisoners. The court said:

> "The officers of the Navy are not his" (the Secretary's) "agents. They, like the Secretary himself, are the agents and representatives of the President. * * * Any authority which the Secretary may exercise over them is solely as the representative of the President, in his name, and as the organ of his will. *United States ex rel. Brown* v. *Root*, 18 App. D. C. 239, 242. The power to relieve the prisoner or to produce him in obedience to the writ is

in the President and not in the Secretary of the Navy."

McGowan v. *Moody*, 22 App. D. C. 148, 164.

Plaintiffs in error complain in substance that *the President neglected* his alleged duty of personally reviewing the proceedings and that *the honest and faithful board neglected* their duty of affording opportunity for a hearing before them. But there is no suggestion of neglect of any duty imposed upon the Secretary of War, whose only function arose because of delegation of the President's authority and consisted in exercising his judgment and discretion as to the sufficiency of the showing made against the plaintiffs in error and others similarly placed. It is not contended that his judgment and discretion are reviewable on mandamus (*U. S.* v. *Lamont*, 155 U. S. 303).

The situation, in one aspect, resembles that in *Ex parte Rowland*, 104 U. S. 604, 617, in which Chief Justice Waite said:

> "Their obligations" (the obligations of the county commissioners) "in this respect end where those of another public officer begin. They *cannot be required* by mandamus *to compel another* public *officer to do his duty*, if, without their intervention, the moving party can himself accomplish the same result." * * * (Mandamus) "only lies when there is practically no other remedy. As a necessary consequence, the *writ must issue directly against him whose duty it is* to do the thing which the parties seek to have done; for, as was said in *Reg.* v. *Mayor of Derby* (2 Salk. 436), 'it is absurd

that the writ should be directed to one person to command another.'"

Ex parte Rowland, 104 U. S. 604, 617.

That judicial control may only be exercised over officers in respect of a duty for which they are directly responsible *virtute officii* was also recognized by this court in *Fitts* v. *McGhee* and in *Ex parte Young*, from which, the following extracts are quoted:

"Neither of the * * * officers named held any special relation to the particular statute, alleged to be unconstitutional. They were not *expressly* directed to see to its enforcement"

Fitts v. *McGhee*, 172 U. S. 516, 530.

"In making an officer * * * a party defendant in a suit to enjoin the enforcement of an act, * * * it is plain that such officer must have some connection with the enforcement of the act. * * * It has not, however, been held that it was necessary that such duty" (of the party defendant) "should be declared in the same act which is to be enforced. * * * The fact that the * * * officer *by virtue of his office* has some connection with the enforcement of the act is the important and material fact, and whether it arises out of the general law or is specially created by the act itself, is not material, so long as it exists"

Ex parte Young, 209 U. S. 123, 157.

Other decisions to the same effect are:

Missouri ex rel Laclede Gas L. Co. v. *Murphy*, 170 U. S. 78, 96, 99.

Supervisors v. *U. S.*, 18 Wall. 71, 78.

German Sec. Bank v. *Coulter*, 112 Ky. 577; 66 S. W. 425, 426.

Farrell v. *King*, 41 Conn. 448, 451, 453.

Holtzclaw v. *Riley*, 113 Ga. 1023; 39 S. E. 425.

U. S. ex rel Strasburger v. *Commissioners*, 5 Mackey 389.

In any view of the matter, it is therefore impossible to say (paraphrasing the language used in *Reeside* v. *Walker*, 11 How. 272, 289,) that the Secretary of War *himself* has refused to act.

2. But plaintiffs in error contend that even if the Secretary of War is not charged with any duty by law of reinstating military officers eliminated through invalid orders of discharge or retirement, he is compellable through mandamus to revoke the orders in question, because they were his own orders and thus he is compellable to order their reinstatement.

The argument is a complete *non sequitur*. The orders of discharge and retirement (whether valid or invalid) were presidential orders and a subordinate of the President can not be compelled to revoke them. *Garfield* v. *Goldsby*, 211 U. S. 249, relied on by plaintiffs in error, is in no respect inconsistent with our contentions. It is true that there the Secretary of the Interior was required to cure wrongful acts of his, which were in excess of the authority conferred upon him by law, but the acts necessary to cure them were purely ministerial acts, entirely within the scope of the duties and cast upon him *virtute officii* by statute. The statutes, which named the Secretary of the Interior, expressly and specifically enjoined upon him

the duties, which, if performed, would have rendered mandamus superfluous, were:

Act of June 28, 1898, sec. 12; 30 Stat. 498.
Act of March 3, 1901; 31 Stat. 1077.
Act of July 1, 1902; 32 Stat. 641, 646.

C.

UPON MANDAMUS, DOUBTS CONCERNING THE INTERPRETATION OF STATUTES MUST BE RESOLVED AGAINST RELATORS.

Hall v. *Payne*, 254 U. S. 343, 347.
Redfield v. *Windom*, 137 U. S. 636, 643.
Ex parte Muir, 254 U. S. 522, 534.
Ness v. *Fisher*, 223 U. S. 683, 692.
Dunlap v. *Black*, 128 U. S. 40, 48.
Decature v. *Paulding*, 14 Pet. 497.
Miller v. *Raum*, 135 U. S. 200, 204.

In order to succeed, plaintiffs in error must show that there is *no reasonable basis* for the interpretation of section 24b adopted by the War Department. This is clearly hopeless. Even were the case not one of mandamus, the departmental interpretation would be entitled to great weight. (Authorities, supra, p. 103.)

D.

RELATORS' OFFICES HAVE EXPIRED BY LAPSE OF TIME SINCE THESE ACTIONS WERE INSTITUTED, IRRESPECTIVE OF THE MERIT OF THE CAUSES OF ACTION AT THE TIMES WHEN THE PETITIONS WERE FILED.

No offices, therefore, exist at present to which these plaintiffs in error could be restored. It follows, of course, that writs of mandamus can not be granted.

Heitmuller v. *Stokes*, 256 U. S. 359.

Payne v. *Hearst*, 50 App. D. C. 162; 269 Fed. 678.

Norris v. *U. S.*, Opin. Nov. 7, 1921, by Mr. Justice Day.

Both of the plaintiffs in error, at the time of their respective orders of discharge and of retirement, were colonels of Infantry in virtue of recess appointments. The petitions allege with meticulous care presidential nomination and senatorial confirmation, in respect of relators' other appointments, but not in respect of the appointments in question, which are alleged to have taken place July 1, 1920, as to Col. French (Rec. p. 2) and July 20, 1920, as to Col. Creary (Rec. p. 2).

In July, 1920, the Senate of the United States was not in session and its next session expired March 4, 1921; both of which facts are known judicially to this court. Each of the plaintiffs in error failed of confirmation and appointment thereafter. Confirmations, it is believed, are matters that are taken judicial notice of. Moreover, want of confirmation, at least up to the time of filing the petitions, is clearly implied therein. Allegations in the nature of pleas of *puis darrein continuance*, showing want of confirmation before March 5, 1921, were tendered by defendant and refused. (French rec. pp. 32, 33; Creary rec. p. 33; *Thompson* v. *United States*, 103 U. S. 480, 483).

In this situation, the status of plaintiffs in error is regulated by the Constitution (art. 2, sec. 2, clause 3) and by section 51 of the Army reorganization act (41 Stat. 759, 786, 787). The latter reads as follows:

> "Whenever prior to December 31, 1920, any person shall be nominated to the Senate for appointment to fill any office in the Regular Army provided for by this act, the President alone is authorized to appoint such person

> temporarily in the United States Army in the grade pertaining to such Regular Army office, to have rank and pay from the same dates as if such appointment were in the Regular Army. *Such temporary appointment shall terminate* upon acceptance, after confirmation, of the corresponding office in the Regular Army, or *on March 4, 1921, if then still unconfirmed.*"

As there is no allegation of confirmation by the Senate of either plaintiff in error in the office to which, he seeks restoration by mandamus, or of appointment in virtue thereof, it follows necessarily that the commission of each plaintiff in error in respect of such office expired March 4, 1921, if not before; this being the rule declared both by the Constitution and by section 51 of the reorganization act, supra.

Were plaintiffs in error to argue that upon failure of confirmation, they revert to their preceding grades in the permanent military establishment, to wit, Col. French to the grade of major (rec. p. 2) and Col. Creary to the grade of lieutenant colonel (rec. p. 2), and could be restored to such preceding grades by mandamus, the answer would be that the right to revert in these circumstances involves a close and well-balanced question, and can not, therefore, be recognized in an action of mandamus. There is, of course, no question of reverting to any of the abolished offices in the temporary forces (41 Stat. 786; 40 Stat. 82).

The right to revert has been asserted by Attorney General Wickersham (29 Ops. Atty. Gen. 598), and denied by Attorney General Garland (Opinion Apr. 27, 1885, to the Secretary of War) and by President

Fillmore's ruling of September 24, 1852. The latter, which was addressed to the Secretary of the Navy reads, in part, as follows:

> "It appears to me on looking at this subject that the promotion of a naval or military officer from one grade to another, and the acceptance by him of the higher grade, *necessarily vacates* his office in the lower, as the two positions, implying rank and command on the one side, and subordination on the other, are incompatible with each other. As the commissions which promote these officers to the higher rank expired at the close of the last session of Congress, the inevitable consequence would seem to be that these officers are out of commission. They lost their first rank on promotion to and acceptance of the higher, and the commissions to the higher having expired, they are no longer officers of the Navy."

The doubt as to what the correct rule is will, of course, not be solved in favor of relators in an action of mandamus (*Hall* v. *Payne*, 254 U. S. 343, 347, and cases cited supra at p. 126).

IV.

The judgments of the Court of Appeals herein should be affirmed with costs.

JAMES M. BECK,
Solicitor General of the United States,
Attorney for Defendant in Error.

JAMES M. BECK,
FREDERICK M. BROWN,
Of Counsel.

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In the Supreme Court of the United States.

OCTOBER TERM, 1921

THE UNITED STATES OF AMERICA,
ex rel JOHN W. FRENCH,
Plaintiff in Error,
vs.
JOHN W. WEEKS, SECRETARY OF WAR,
Defendant in Error.

No. 724.

THE UNITED STATES OF AMERICA,
ex rel WILLIAM F. CREARY,
Plaintiff in Error,
vs.
JOHN W. WEEKS, SECRETARY OF WAR,
Defendant in Error.

No. 725.

BRIEF OF DANIEL WILKINSON IDDINGS, as Amicus Curiae

DAYTON, OHIO,
April 8, 1922.

PRESS OF GIBSON BROS., INC., WASHINGTON, D. C.

In the Supreme Court of the United States.

OCTOBER TERM, 1921

THE UNITED STATES OF AMERICA,
ex rel JOHN W. FRENCH,
Plaintiff in Error,
vs.
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JOHN W. WEEKS, SECRETARY OF WAR,
Defendant in Error.
No. 725.

BRIEF OF DANIEL WILKINSON IDDINGS, as Amicus Curiae

STATEMENT OF THE CASE

Amicus Curiae feels more than warranted in filing this Brief from the fact that the method and plan employed to retire or oust from the Army the officers who are relators to the Plaintiffs in Error here, was a general

method and plan of action under Section 24B of the National Defense Act of June 4, 1920 (41 Stat. 759), adopted and executed as admitted by the Answer of Defendant in Error, by a former Secretary of War, the present Secretary being merely substituted here. As a result of this general method and plan so adopted and executed several hundred army officers were either *forcibly* retired, or ousted *without honor*. These officers and their families, as well as officers still in the service, anxiously await the outcome of these cases.

We have had a recent revision of Army Court Martial procedure, and so fair are the general results of trials thereunder, that it seems unthinkable that a new vehicle of terror and despotism should be licensed under Sec. 24-b of the Act aforesaid, to accomplish thus by indirection what cannot, and doubtless never could, have been done by direction, to-wit: by court martial and full hearing.

In addition to the general interest thus disclosed in these cases, Amicus Curiae frankly states that he represents as counsel one of these officers thus ousted without honor, the facts of whose particular case, though de hors the record, may be shortly stated, for illustrative purposes only, as an officer of over 17 years service with distinction and a very high degree of responsibility who was court-martialed on charges relating solely to his domestic affairs, and, having been acquitted on most of the specifications and charges by the court martial itself, was later *entirely exculpated* by the President on the ground of insufficient evidence. A year later, having meantime discharged his duties faithfully, he was classified, by the Board provided for in said section, in Class B, and on notification thereof, demanded and received a hearing before a Court of Inquiry. The official records there presented

over his objection to substantiate the proposed classification consisted principally of the court martial record in which he had been exculpated. The Court of Inquiry found his classification in Class B *unwarranted,* recommended his retention in the service, and so informed him. Nevertheless without any knowledge thereof, or opportunity to be heard thereby, his case went to a so-called Honest and Faithful Board, which found his classification aforesaid as due to "neglect, misconduct and avoidable habits," and thereafter his "discharge from the Army *by direction of the President*" for these causes (enumerated) under the foregoing section, was announced by the Chief of Staff in Special Orders of the War Department. Receipt of copy of such Special Orders was his first knowledge that the favorable action of his Court of Inquiry had been ignored, and still later he discovered through his counsel then employed that the President had never personally considered his case, although the President personally had a year previous favorably acted on substantially the same official record developed in his court martial trial. It is evident that this officer was ousted without honor under said Section 24-B for the same alleged offenses as resulted in his exculpation and retention in service under court martial proceedings.

Section 24-B, whose construction is alone involved in these cases, having been quoted in full in Brief of Plaintiffs in Error, page 2, is not again set out here.

Amicus Curiae therefore reasserts that on account of this general interest and of the foregoing illustrative case in particular, he was more than warranted in securing the indulgent permission of counsel of record and of this Honorable Court to file this Brief.

ARGUMENT.

Authorities need not be cited to the effect that the statute under consideration is entitled to liberal construction in its operation upon any officer subject to its provisions, and to the corrolary that it must be strictly construed against the Government attempting to utilize its provisions.

Another sound rule of statutory construction is that a given statute must be taken from its "four corners," like a will, to determine its real meaning.

With these rules applied to the instant statute, Amicus Curiae makes bold his claim that liberally construed in favor of any officer and strictly construed against the Government this statute taken from its "four corners" provides only a new and supplementary means or method of court martial, which, although evidently contemplating wholesale action and results, is fully safeguarded internally by several courts therein mentioned, with *revision power* in the President himself, who is the *convening authority,* at least of the Final Classification Board, the primary tribunal provided.

It is evident from the Congressional Record (quoted at page 16 of the Brief of Plaintiffs in Error) that Congress had this idea of the meaning of the statute when it enacted it,—there was no "idea of setting up any star chamber proceedings whatever." And yet that is exactly what the record shows has been done in these cases.

Not only has the "star-chamber" or secret plan of proceeding been adopted and executed by the former Secretary of War himself in the instant cases, but all semblance of judicial inquiry has been ignored. Worse still, though, and the crux of the illegality complained of, has been the absolute denial of the right of final revision by the Presi-

dent, conferred by the express words of the statute. The President of the United States never saw the record of the proceedings in these cases. Therefore he could make no "order" for "further revision." Relators never knew where they stood until the Special Orders came, *forcibly* retiring the one, and ousting the other *without honor*. It was then too late. How could they have personally sought "revision" by the President?

Relators had no due process, nor hearings before the Final Classification Board, the Honest and Faithful Board, or the President himself, as their Commander-in-Chief, and the convening authority.

The only court open to them was the Court of Inquiry, apparently, as permitted to function, merely a recommendatory tribunal, a court in name only, placed intermediately, but utilized in the plan of procedure of the former War Secretary, to furnish merely some semblance of judicial background to the whole proceedings, though in truth and in fact a farce and a sham.

As applicable here, Amicus Curiae stands squarely on the principles long ago enunciated in the Runkle Case (122 U. S. 543) cited in Brief of Plaintiffs in Error.

The power to retire or discharge officers from the Army under said Section 24-B of the National Defense Act is a judicial power, reposing finally in the President himself with preliminary hearings by the courts provided by the statute, of which he is convening authority.

The President could not delegate such authority of *revision* as the Statute gave him, and therefore the action of the former War Secretary approving the actions of the Boards, and retiring and dismissing relators, even though under general instructions from the President, was null and void.

In this view Amicus Curiae, although of the abounding belief that due process and hearings are essential to the validity of proceedings before the Final Classification and Honest and Faithful Boards, is content to defer to the Argument on these Points of the Brief of Plaintiffs in Error.

Mandamus is not asked against the President of the United States in these cases. Mandamus is asked against the Secretary of War, unfortunately, due to the vicissitudes of politics and resultant change of such officers, now a gentleman who had no part in these cases.

That such Secretaries who exercise arbitrary power and exceed their authority may be compelled by mandamus to restore the status of aggrieved parties is well settled. Garfield *v.* United States ex rel Goldsby, 211 U. S. 249.

It is therefore respectfully submitted that the judgment of the Court of Appeals should be reversed with directions to that court to enter judgment affirming the judgment of the Supreme Court of the District of Columbia.

DANIEL WILKINSON IDDINGS,
as Amicus Curiae.

DAYTON, OHIO,
April 8, 1922.

SUPREME COURT OF THE UNITED STATES.

No. 724.—October Term, 1921.

The United States of America, *ex relatione* John W. French, Plaintiff in Error, *vs.* John W. Weeks, Secretary of War.	In Error to the Court of Appeals of the District of Columbia.

[May 29, 1922.]

Mr. Justice Clarke delivered the opinion of the Court.

In the petition in this case a writ of mandamus is prayed for, commanding the Secretary of War to annul an order by him, purporting to have been made by direction and authority of the President, approving the action of a final classification board and retiring the relator, Colonel John W. French, from active service in the Army, under the provisions of Section 24b of the Army Re-organization Act, approved June 4, 1920 (41 Stat. 759, 773), and to restore him to the status of a Colonel of Infantry which he had before the order. The Secretary of War filed an answer and a demurrer thereto being sustained, the writ was allowed by the Supreme Court of the District of Columbia, as prayed for. This judgment was reversed by the Court of Appeals of the District of Columbia and the case is here on writ of error for construction of the statute and on the question of the jurisdiction of the court to issue a writ of mandamus in such a case.

The Army Reorganization Act is intended to provide for a reduction of the Army of the United States to a peace basis while maintaining a standard of high efficiency. To contribute to this purpose, Congress made elaborate provision in the Act for retaining in the service officers who had proved their capacity and fitness for command and for retiring or discharging those who, for any reason, were found to be unfit. Every step of this process is committed to military tribunals, made up of officers, who by experience and training should be the best qualified men in the country for

such a duty, but with their action all subject, as we shall see, to the supervisory control of the President of the United States.

Not being in any sense a penal statute, the Act should be liberally construed to promote its purpose, and it is of first importance that that purpose shall not be frustrated by unnecessarily placing technical limitations upon the agencies which are to carry it into effect. (*Street* v. *United States*, 133 U. S. 299).

Section 24b deals only with the "Classification of Officers," and is printed in the margin.* The process provided by the section for classifying and reducing the number of officers, is as follows:

First: The President shall convene a board of not less than five general officers, which shall arrange all officers in two classes, viz: "Class A, consisting of officers who should be retained in the service, and Class B, of officers who should not be retained in the service." This classification is tentative and since it is intended simply to furnish a basis for further action the board will be referred to herein as the "Preliminary Classification Board." No exception is taken as to the manner in which this board was convened or as to its composition.

Second: If, when an officer is notified that he has been placed in Class B by the Preliminary Classification Board, he shall request,

*"Sec. 24b. CLASSIFICATION OF OFFICERS.—Imediately upon the passage of this Act, and in September of 1921 and every year thereafter, the President shall convene a board of not less than five general officers, which shall arrange all officers in two classes, namely: Class A, consisting of officers who should be retained in the service, and Class B of officers who should not be retained in the service. Until otherwise finally classified, all officers shall be regarded as belonging to Class A, and shall be promoted according to the provisions of this Act to fill any vacancies which may occur prior to such final classification. No officer shall be finally classified in Class B until he shall have been given an opportunity to appear before a court of inquiry. In such court of inquiry he shall be furnished with a full copy of the official records upon which the proposed classification is based and shall be given an opportunity to present testimony in his own behalf. The record of such court of inquiry shall be forwarded to the final classification board for reconsideration of the case, and after such consideration the finding of said classification board shall be final and not subject to further revision except upon the order of the President. Whenever an officer is placed in Class B, a board of not less than three officers shall be convened to determine whether such classification is due to his neglect, misconduct or avoidable habits. If the finding is affirmative, he shall be discharged from the Army; if negative, he shall be placed on the unlimited retired list with pay at the rate of 2½ per centum of

as Colonel French did, an opportunity to appear before a Court of Inquiry, then "he shall be furnished with a full copy of the official records upon which the proposed classification is based and shall be given an opportunity to present testimony in his own behalf."

The powers and procedure of such a Court of Inquiry are not defined in the section, but their definition is found in Chapter II of the Act, being Articles of War 97 and 103, inclusive (41 Stat. 807) in which it is provided, that such a Court of Inquiry "shall consist of three or more officers" (Art. 98), that it "shall not give an opinion on the merits of a case inquired into unless specially ordered to do so" (Art. 102), and that "it shall keep a record of its proceedings which . . . shall be forwarded to the convening authority." (Art. 103.) In this case, however, section 24b provides that the record of the Court of Inquiry shall be forwarded to the Final Classification Board.

Third: After a hearing has been had by a Court of Inquiry the section requires that its record shall be forwarded to the Final Classification Board for re-consideration of the case, "and after such consideration *the finding of said classification board shall be final and not subject to further revision except upon the order of the President.*

No objection is made in this Court to the manner of the convening nor to the membership of this Board.

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his active pay multiplied by the number of complete years of commissioned service, or service which under the provisions of this Act is counted as its equivalent, unless his total commissioned service or equivalent service shall be less than ten years, in which case he shall be honorably discharged with one year's pay. The maximum retired pay of an officer under the provisions of this section prior to January 1, 1924, shall be 75 per centum of active pay, and of one retired on or after that date, 60 per centum. If an officer is thus retired before the completion of thirty years' commissioned service, he may be employed on such active duty as the Secretary of War considers him capable of performing until he has completed thirty years' commissioned service. The board convened upon the passage of this Act shall also report the names of those second lieutenants of the Quartermaster Corps who were commissioned under the provisions of section 9 of the Act of June 3, 1916, who are not qualified for further promotion. The officers so reported shall continue in the grade of second lieutenant for the remainder of their service and the others shall be placed upon the promotion list according to their commissioned service, as hereinbefore provided."

Fourth: After the Final Classification Board has made a finding, if the President does not order further revision and the officer who has demanded the Court of Inquiry is continued in Class B, then the section provides that another "board of not less than three officers shall be convened to determine whether such classification is due to his neglect, misconduct or avoidable habits. If the finding is affirmative, he shall be discharged from the Army; if negative, he shall be placed on the unlimited retired list with pay," as provided in the section.

This board will be hereinafter referred to as the "Honest and Faithful Board," a name by which it is commonly and widely designated. The action of this board is not and could not be complained of for it was favorable to the relator.

It is to be observed that there is no requirement in the section, that the officer whose case is under consideration shall either be notified of the hearing or that he shall be heard, by any of the tribunals thus provided for, except the Court of Inquiry.

The facts essential to the decision of the case, derived from the allegations of the petition not denied in the answer and from the allegations of the answer admitted by the demurrer, are as follows: When the relator was notified that he had been tentatively placed in Class B as an officer not to be retained in the Army, he requested a Court of Inquiry, which was thereupon convened. He appeared before that court, was represented by counsel, and was given an opportunity to present testimony of himself and others in his behalf of which he availed himself.

The record of the Court of Inquiry was forwarded to the Final Classification Board for reconsideration of the case, but the classification of relator in Class B was adhered to by that board, and was approved by the Secretary of War, under authority from the President, which, it is averred and admitted by the demurrer, was given to him prior to any determination in the relator's case. Prior to the submission of the record of the Final Classification Board to the Honest and Faithful Board for the purpose of having determined the cause of the relator's classification, the Secretary of War, "acting on behalf of and by the authority of the President," signed at the foot of that record the notation: "Approved: Baker, Secretary of War." After the Honest and Faithful Board had determined that relator's classification was not due to his

own neglect, misconduct or avoidable habits, he was retired from service by the following order:

"Washington, D. C., December 24, 1920.

"The action of the Classification Board in finally classifying Colonel John W. French, Infantry, in Class B, is approved by the President and, by his direction, a board of officers having determined that such classification is not due to the officer's neglect, misconduct or avoidable habits, Colonel French is retired from active service, after twenty-two years of commissioned service, under the provisions of section 24b of the act of Congress approved June 4, 1920.

"NEWTON D. BAKER,
"*Secretary of War.*"

Newton D. Baker having been succeeded by John W. Weeks as Secretary of War, Secretary Weeks was substituted as defendant in the case.

While there are allegations in the petition that various formalities in the procedure prescribed by section 24b were not complied with, reliance is not placed upon any of these, in the assignments of error in this court and in argument the relator presses only one question upon our attention for decision, viz:

It is contended that section 24b imposes a personal, non-delegable, judicial duty upon the President, to review the record of the Board of Final Classification in each case after it has made a finding, and by his order, to approve or disapprove it, and that because the approval in this case was not made by the President personally but by the Secretary of War, acting under delegated general direction and authority from the President, it is void and must be so treated.

The construction of the section thus contended for, obviously, would place such a burdensome, if not impossible, personal duty upon the President during the process of reducing the army from a war to a peace basis that if Congress had intended to attempt such a thing, we may be sure its purpose would have been clearly expressed, and not left to doubtful implication.

The argument for the relator is bottomed entirely upon the use of the words "except upon the order of the President," for there is nothing else in the section suggesting participation by the President after the convening of the Preliminary Classification Board, and we are thus brought to consider the construction which should be placed upon these seven words.

To give the effect claimed for the words by the relator would result in denying any meaning whatever to the clear and emphatic declaration immediately preceding them that "the finding of said Classification Board shall be final and not subject to further revision," for it would render such finding ineffective in every case until approved by the President, and then, of course, its effect and finality would be derived from the President's approval and not from the finding of the Board, which would be rendered, at most, merely advisory. Familiar principles (*United States* v. *Gooding*, 12 Wheat. 460; *Peck* v. *Jenness*, 7 How. 612; *Montclair* v. *Ramsdell*, 107 U. S. 147), forbid the acceptance of such a construction save under the compulsion of a clear expression of congressional purpose, such as is not to be found in either the section or the act we are considering.

But both the meaning and purpose of the entire expression seem very clear. The declaration that the finding of the Final Classification Board shall be "final and not subject to further revision" could not be more emphatically worded, while the exception "upon the order of the President" is in such general terms that it plainly contemplates only discretionary action on his part to be taken, on the suggestion of the Secretary of War in special cases, on the application of officers involved or their friends, or on his own "mere motion." The exception plainly enough was inserted, not for the purpose of imposing a very great burden upon the President, but rather as a congressional recognition of the right in him as the Chief Executive and Commander-in-Chief of the Army (a right which he probably would have had without it), to interfere in such cases at his option, leaving the finding of the Board to become final should he elect not to take any action, and perhaps, also, for the purpose of forestalling the chance of its being successfully argued that the unusual finality—"not subject to further revision"—given to the finding of the Board, was intended to place such finding beyond the power of interposition in any case by the President. This construction gives consistent effect to each clause of the provision and that contended for by the relator must be denied.

In support of his contention, which has thus been rejected, the relator relies upon *Runkle* v. *United States*, 122 U. S. 543; *United States* v. *Page*, 137 U. S. 673, and *United States* v. *Fletcher*,

148 U. S. 84. All of these were court-martial cases, conducted under authority of the then 65th Article of War (2 Stat. 367, chap. 29) which prescribed that the sentence of such a court in cases such as were there under consideration should not be carried into execution "until after the whole proceedings shall have been transmitted to the Secretary of War, to be laid before the President of the United States for his confirmation or disapproval and orders in the case." It was held, obviously enough, that the quoted language called for personal review and action by the President and that making him, as it did, in effect, a member of the court, the required review was judicial in character and therefore non-delegable. The difference between such a statute and the one we have here renders these decisions too plainly inapplicable for discussion.

Under the construction of section 24b thus arrived at neither personal nor delegated approval by the President of the finding by the Final Board of Classification was necessary before action by the Honest and Faithful Board, and, if no action whatever had been taken by him through the agency of the Secretary of War that finding, by force of the express words of the statute, would have become "final and not subject to further review," and thereupon the case would have been ripe for the further action prescribed by the statute.

Since the section did not require personal action by the President, the action on his behalf and by his authority, taken by the Secretary of War, was in a legally sufficient form. (R. S. 216; *Willcox* v. *Jackson*, 13 Pet. 498, 513; *Williams* v. *United States*, 1 How. 290, 297; *Chicago, Milwaukee & St. Paul Railway Company of Idaho* v. *United States*, 244 U. S. 351, 357).

But the Court of Appeals held that the action of the Secretary of War, which is assailed in the case, was taken in the exercise of duly delegated administrative power of the President and was really executive action by him which the courts may not control by mandamus or otherwise and that, therefore, the judgment of the Supreme Court of the District of Columbia was without jurisdiction and void.

As a Colonel in the Army, the relator was subject to military law and the principles of that law, as provided by Congress, constituted for him due process of law in a constitutional sense. *Reaves* v. *Ainsworth*, 219 U. S. 296, 304.

By the demurrer it is admitted that the three Boards and the Court of Inquiry, provided for by Section 24b, were lawfully convened and constituted. They obviously had jurisdiction over the relator and over the subject-matter involved, and there is no contention that any of them exceeded the scope of its lawful powers. The only infirmity claimed to exist in the entire proceeding is, that the review and approval of the findings of the Final Classification Board and the ultimate order retiring relator from the Army, were made by the Secretary of War, "acting in the name of and by the authority of the President," instead of by the President personally. But we have found this contention unsound and that the action of the President by the Secretary was a legally sufficient compliance with the Act of Congress.

Thus we have lawfully constituted military tribunals, with jurisdiction over the person and subject-matter involved unquestioned and unquestionable, and action by them within the scope of the power with which they are invested by law. It is settled beyond controversy that under such conditions decisions by military tribunals, constituted by Act of Congress, cannot be reviewed or set aside by civil courts in a mandamus proceeding or otherwise. *Johnson* v. *Sayre*, 158 U. S. 109, 118; *Carter* v. *McClaughry*, 183 U. S. 365, 380, 381; *Mullan* v. *United States*, 212 U. S. 516, 520; *Collins* v. *McDonald*, decided April 10, 1922.

"If it were otherwise, the civil courts would virtually administer the rules and articles of war, irrespective of those to whom that duty and obligation has been confided by the laws of the United States, from whose decisions no appeal or jurisdiction of any kind has been given to the civil magistrate or civil courts." *Dynes* v. *Hoover*, 20 How. 65, 82.

It results that, because the action of the President, given effect by the order of the Secretary of War, was in full compliance with the Act of Congress, and also because the Supreme Court did not have jurisdiction to order the writ of mandamus prayed for, the judgment of the Court of Appeals reversing the judgment of that court must be

Affirmed.

A true copy.

Test:

Clerk, Supreme Court, U. S.

SUPREME COURT OF THE UNITED STATES.

No. 725.—October Term, 1921.

The United States of America *ex relatione* William F. Creary, Plaintiff in Error, *vs.* John W. Weeks, Secretary of War.	In Error to the Court of Appeals of the District of Columbia.

[May 29, 1922.]

Mr. Justice Clarke delivered the opinion of the Court.

This case is in most respects so like No. 724, *The United States of America ex rel. John W. French, Plaintiff in Error* v. *John W. Weeks, Secretary of War*, that the two were argued and submitted together.

The relator herein was a Colonel in the Army and was discharged on November 17, 1920, "by direction of the President" on order of the Secretary of War, under the provisions of Section 24b of the Army Re-organization Act (41 Stat. 759, 773). In his petition he prays, as did Colonel French in the other case, for a writ of mandamus commanding the Secretary of War to vacate the order for his discharge and to restore him to the status of Colonel in the Army, which he had held before the order.

The defendant answered the petition, a demurrer to the answer was sustained, and the defendant not desiring to plead further, the Supreme Court of the District of Columbia granted the writ of mandamus as prayed for. On error the Court of Appeals of the District of Columbia reversed the judgment of the Supreme Court and the case is here for construction of the Act of Congress involved.

In addition to the contention that Section 24b of the Army Reorganization Act required personal and judicial action on the part of the President, this day disposed of in No. 724, only one other question is argued in this case, viz: Did the failure to give the relator notice of the time and place of the meeting of the Honest

and Faithful Board which considered his case, with an opportunity to be heard in his own behalf, so deny to him due process of law as to render void the action resulting in his discharge?

We shall not repeat the discussion of Section 24b which led to our conclusion in No. 724, but we shall here confine ourselves to the additional question, as we have stated it, presented by this record.

When Colonel Creary was notified that he had been placed in Class B, as an officer "who should not be retained in the service," he requested a Court of Inquiry, which was thereupon convened, and it is averred in the answer and admitted by the demurrer that "by and before that Board he was given full and free opportunity to present testimony of himself and others in his behalf and to be heard fully, of which opportunities he availed himself so far as he desired."

The record of the Court of Inquiry was forwarded, as provided for by Section 24b to the Board of Final Classification, and that Board, without notice to the relator, re-considered his case, but by its final finding retained him in Class B. Thereupon, again without notice to relator, his case went to the Honest and Faithful Board, which finally classified him in Class B for "causes due to his neglect, misconduct and avoidable habits," and under the terms of the statute he was discharged from the Army.

Thus is presented for decision the question whether the due process clause of the Fourteenth Amendment required that the relator should be given an opportunity to be heard before the finding was made by the board which required his discharge from the Army.

The power given to Congress by the Constitution to raise and equip armies and to make regulations for the government of the land and naval forces of the country (Art. I, Sec. 8) is as plenary and specific as that given for the organization and conduct of civil affairs; military tribunals are as necessary to secure subordination and discipline in the army as courts are to maintain law and order in civil life; and the experience of our Government for now more than a century and a quarter, and of the English Government for a century more, proves that a much more expeditious procedure is necessary in military than is thought tolerable in civil affairs (2 Stat. 359; *Dynes* v. *Hoover*, 20 How. 65). It is difficult

to imagine any process of government more distinctively administrative in its nature and less adapted to be dealt with by the processes of civil courts than the classification and reduction in number of the officers of the army, provided for in section 24b. In its nature it belongs to the executive and not to the judicial branch of the Government.

In the present case it is admitted that the relator was given full opportunity to be heard and that he was heard by the Court of Inquiry, and this is the only one of the four tribunals which dealt with his case which the act of Congress requires shall give him a hearing. The various boards provided for, each certainly had jurisdiction over the person of the relator as an army officer and over the subject of inquiry, under the terms of the act of Congress, and also because the right dealt with was distinctly military in its nature, affecting the status in the army of a soldier, and it is entirely clear that the boards which acted on his case did not exceed the powers conferred upon them. Such being the case, the Supreme Court of the District was without power to review or in any manner control the conduct of the boards or the result of their action. *Dynes* v. *Hoover*, 20 How. 65, 82; *Johnson* v. *Sayre*, 158 U. S. 109; *Carter* v. *McGlaughry*, 183 U. S. 365, 380; *Mullan* v. *United States*, 212 U. S. 516; *Reaves* v. *Ainsworth*, 219 U. S. 296, 304. Without pursuing the subject further it is sufficient to repeat what was said by this court in *Reaves* v. *Ainsworth*, 219 U. S. 396, 304: "To those in the military or naval service of the United States, the military law is due process. The decision, therefore, of a military tribunal acting within the scope of its lawful powers cannot be reviewed or set aside by the courts."

It results that, because the action of the President, given effect by the order of the Secretary of War, was in full compliance with the act of Congress, and also because the Supreme Court did not have jurisdiction to order the writ of mandamus prayed for, the judgment of the Court of Appeals reversing the judgment of that court must be

Affirmed.

A true copy.

Test:

Clerk, Supreme Court, U. S.